EARL, Sax. earle, Lat. comes. This it is said was a great title among the Saxons, and is the most ancient of the English peerage, there being no title of honour used by our present nobility that was likewise in use by the Saxons, except this of earl; which was usually applied to the first in the royal line. Verstegan deriveth this word from the Dutch ear, i.e. honour, and ethel, which signifies noble. But, whencesoever it is derived, the title earl was at length given to those who were associates to the king, in his council and martial actions; and the method of investiture into that dignity was per cincturam gladii, without any formal charter of creation. Dugdale's Warw. Soc. 392. William the first, called the Conqueror, gave this dignity in fee to his nobles, annexing it to this or that county or province; and allotting them for the maintenance of it a certain portion of money arising from the prince's profits, for the pleadings and forfeitures of the provinces. Camd. And formerly one earl had divers shires under his government, and had lieutenants under him in every shire, such as are now sheriffs, as appears by divers of our old statutes. Cowel.

But about the reign of King John, and ever since, our kings have made earls of counties, &c. by charter; giving them no authority over the county, nor any part of the profits arising out of it; only sometimes they have had an annual fee out of the exchequer, &c. An earl, comes, was heretofore correlative with comitatus; and anciently there was no earl but had a shire or county for his earldom; but of late times, the number of earls very much increasing, several of them have chosen for their titles some eminent part of a county, considerable town, village, or their own seats, &c. Besides these local earls, there are some personal and honorary; as earl marshal of England; see tit. Constable, Court of Chivalry; and others nominal, who derive their titles from the names of their families. Lex Constitutionum, p. 78. Their place is next to a marquis, and before a viscount: and, as in very ancient
times, those who were created counts or earls, were of the blood royal; our British monarchs to this day call them in all public writings, "our most dear cousin:" they also originally did, and still may, use the style of Nos. See tit. Countee, Peers of the Realm, Sheriff.

EARNEST. Money paid in part of a larger sum, or part of the goods delivered, on any contract, &c. which being done by way of earnest, the property of the goods is absolutely bound by it: and the buyer may recover the goods by action, as well as the vendor may the price of them. And by the statute of frauds, stat. 29 Car. II. c. 3. no contract for sale of goods, to the value of 10l. or more, to be valid, unless such earnest is made or given. See tit. Frauds.

EASEMENT; aisiamentum, from the Fr. aise, commoditas.] Is defined to be a service or convenience, which one neighbour hath of another, by charter or prescription, without profit; as a way through his land, a sink, or such like. Kitch. 105. A person may prescribe to an easement in the freehold of another, as belonging to some ancient house, or to land, &c. And a way over the land of another; a gate-way, water-course, or washing-place on another's ground, may be claimed by prescription as easements. But a multitude of persons cannot prescribe; though for an easement, they may plead custom. Cro. Jac. 170. 3 Leon. 254. 3 Mod. 294. To allege an easement by consuetudin is only, is the best way. And things of necessity shall not be extinguished by unity of possession; but a way of ease may be thus extinguished. Lill. Abr. 496. See tit. Prescription.

EASTER. The name of a goddess which the Saxons worshipped in the month of April, and so called, because she was the goddess of the east. Blount. In our church it is the feast of the Passover, in commemoration of the sufferings of our Saviour.

EAST-INDIA COMPANY.

A corporation, of "United Company of Merchants of England trading to the East Indies;" which name is given to them in stat. 6 Ann. c. 17. § 13. More explicitly, according to their charter, and the adjustment of their rights, by stat. 9 & 10 Wm. III. c. 44. § 61. trading "into, and from the East Indies, in the countries and parts of Asia and Africa, and in, to, and from the islands, ports, havens, cities, creeks, towns, and places of Asia, Africa and America, or any of them, beyond the Cape of Good Hope, to the Straits of Magellan, where any trade or traffic of merchandise is or may be used or had, and to and from every of them."

The laws relative to this important company shall be considered in the following order:

I. The Origin and Union of the Old and New East-India Companies.

II. The State of the present East-India Company, and the Regulations by certain Statutes, and otherwise relating thereto.

III. The Rights permanent and temporary, of the present East-India Company.

IV. Statutes relative to the present East-India Company.
I. The passage by sea to the peninsula of India, and the eastward part of the continent of Asia, the present seats of our Asiatic trade, was not discovered till about the latter end of the fifteenth century; and, of the various attempts made from hence by individuals, to open a trade thither, none proved successful until Queen Elizabeth, by a charter, dated December 31, A.D. 1600, established the first incorporated company by the name of the London East-India Company; the original shares were 50l. each, and the capital was under 400,000l. After a long series of disasters and losses, this company obtained from the country powers of India, at a great expense, the privilege of a limited trade in certain parts of India and Persia; and of making small settlements, or houses of trade, called factories, for the residence of their factors and servants. In those times the charters of the crown, and the powers which they conveyed, were not thought to require parliamentary sanction; nor was it till after the restoration that the rights or authorities derived under them to the company were first called in question.

By the interruptions, however, of speculative adventurers, called interlopers, who had begun to resist the exclusive claims of the old company under their charters, on the ground of their wanting the sanction of parliamentary authority, and by occasional failures of investments of goods from abroad, and the then not unfrequent losses of ships in their passage, the commerce of the company was often chequered with disasters and disappointments.

Notwithstanding these discouragements, the company formed, by degrees, various factories and houses of trade, both in India and Persia. When, by this means, they had at length become more successful, various attempts were made to induce the crown, and even parliament itself, to interpose and revoke the charters of the company; some on pretext that every man had an equal right to trade in the East as well as in the West Indies; while others hoped to effect it on proposals of terms of advantage in point of public finance, that they might themselves be erected into an exclusive company.

Such was the state of things in 1693, when the company, by an accidental failure in the payment of a small duty which had been imposed on their capital stock, (see stat. 4 & 5 W. & M. c. 15. § 10. 12.) gave an opening to government to determine their charters, rendered void by that default; and, though in the same year, the crown, to obviate all doubts, revived their powers and exclusive privileges by a new charter, the company were obliged to submit to a condition, that their capacity of trading should in future be determinable on three years' notice. The legal obstacle to the erecting a new company being thus removed, the stat. 9 & 10 Wm. III. c. 44. was passed, for borrowing two millions on a loan at 8 per cent. towards carrying on the war; and, as an encouragement to subscribers, it was declared, that they should be incorporated by a charter from the king into a general society; with liberty for each individual member to trade to India, and the other limits of the old company's exclusive charter; so that the value of his exports exceeded not his share of this loan or capital; and that such of the subscribers as should choose to convert their subscriptions into a joint stock, should be at liberty so to do, and be incorpo-
rated by a separate charter, by the name of The English East-India Company, with the privilege of trading with and to the amount of such joint stock. All persons, but those incorporated, and such as they should license, were prohibited from this trade, except the old company, who had time given them to wind up their commercial affairs.

The act reserved a power to determine the charters both of the general society and the new company after September, 1711, on repayment of the loan, and three years' notice.

The bulk of the subscribers having agreed to trade as a separate company, with a joint stock, the old company, to whose prejudice the two new corporations were to be erected, found means to become members for a very large proportion of the loan of two millions. With an interest thus acquired, they joined with the English company, and by means of their superior knowledge and possessions, they obtained a decided influence in the general courts of the new company, and thus paved the way to that union which afterwards took place in 1702; and which, A.D. 1708, was confirmed by parliament, by stat. 6 Ann. c. 17. By the terms of this union the warehouses at home, and shipping, and also all the settlements and factories of the old company in the East Indies, Persia and China, including the islands of Bombay and St. Helena with their dependencies, and all their rights and privileges however derived, became vested in the united company; except their body politic, which was surrendered to the crown.

The curious reader may wish to learn what became of the general society, whose members were individually authorized to trade, as far as the value of their subscriptions in goods exported from hence. All that can be discovered of them is, that though they were actually incorporated by the king's charter, and were therefore legally authorized to send ships to India or China, it does not with certainty appear that any one ship was ever fitted out by them; and that the superior advantages of being concerned in the trade to be carried on with a joint stock, were so evident, that, at the time of the union of the two companies, out of the whole loan of two millions, only 7,200l. then remained the property of the separate traders of the general society; and that this sum also was soon absorbed in the United Company, whose capital or trading stock, by which their dividend of profits was to be governed, thereupon became fixed at two millions.

II. The first enlargement of the company's term took place in 1708; (stat. 8 Ann. c. 17.) when the United Company bargained with the public to advance 1,200,000l. as a loan, but without any interest, (or, which operated as the same thing, at a reduced interest of 5 per cent. on the two loans conjointly,) for an extension of their term, in the exclusive trade, of fifteen years; and thus their nominal trading capital, on which the dividend was made, became advanced to 3,200,000l.

In 1712, the company petitioned parliament, (on the ground that the term which remained unexpired in their trade was too short to admit their risking the expenses of regaining and securing the pepper trade, which had been engrossed by the Dutch,) that their corporate capacity might be continued, though the debt
due to them from the public should be redeemed. In consequence of this petition, the stat. 10 Ann. c. 28. passed, for repealing all former provisions and powers of determining their trade or incorporation, but with power to the public to redeem the debt at any time after September, 1733. And thus the United Company were supposed to have obtained a perpetuity, as well in the exclusive trade as in all their chartered rights and capacities. They however submitted themselves in that respect to the pleasure of parliament in 1739; when the stat. 3 Geo. II. c. 14. was passed, for continuing to them their exclusive trade till 1766; for which they gave the public a premium of 200,000l. without any return of either principal or interest, and also agreed to a reduction of the rate of interest to 4 per cent. on the debt of 3,200,000l. and to accept of payment of the principal by instalments of 500,000l.

In 1744, they contracted for and obtained, by stat. 17 Geo. II. c. 17. a further addition of fourteen years in the exclusive trade, for which they lent to the public one million at 3 per cent. And, in 1750, they agreed, by stat. 23 Geo. II. c. 22. to a further reduction of the rate of interest on the former debt to 3 per cent. Thus grew the debt of 4,200,000l. from the public to the United Company, carrying with it an annuity of 125,000l. This was called the 3 per cent. East-India annuities, and are now consolidated with the 3 per cent. Bank annuities. See tit. National Debt. But the company's capital or nominal sum, by which their dividends were governed, continued as before at 3,200,000l. The million last lent having been raised by their bonds, and therefore not added to their former capital.

The next renewal, and the last previous to stat. 33 Geo. III. c. 32. (stated at large post, IV.) was made by contract with the public by stat. 21 Geo. III. c. 65. § 9. when a further term, determinable in 1794, was granted in the exclusive trade on payment of 400,000l. in discharge of all claims on the company by the public, previous to March 1st, 1781. But it was provided, that after payment of a yearly dividend of 8 per cent. to the holders of India stock, the surplus of all the net proceeds of their trade and revenues should be applied, three-fourths to the use of the public, and the remaining one-fourth to the use of the company.

The debts incurred by the company, in the wars subsisting in India at and after that period, prevented any such surplus from arising; and therefore no participation of revenue took place under this act. On the contrary, the pressure of those debts, and the compulsory clauses of an act of 1784, by which the company were obliged to keep a stock of teas always in their warehouses, sufficient for one year's consumption, rendered it necessary for them to enlarge their actual trading capital, by new subscriptions, to 5,000,000l. for which they had the sanction of parliament granted them by stat. 26 Geo. III. c. 62. (explained by stat. 31 Geo. III. c. 11.) and stat. 29 Geo. III. c. 65.

In 1783, the public agreed to forego any participation of the funds of the company under the said stat. 21 Geo. III. c. 65. until certain debts should be discharged; and by the relief act of 1784, the participation, as settled in 1781, was to be resumed as soon as the debts therein specified were paid, and the bond debt reduced to a million and a half. See stats. 22 Geo. III. c. 83. 24 Geo. III. c. 34. See also 32 Geo. III. c. 47. enabling the company to increase
their stock, &c. 34 Geo. III. c. 41. empowering them to continue and increase their bond-debt: 37 Geo. III. c. 31. enabling them to increase their stock; and 47 Geo. III. st. 2. c. 41. for further increasing their bond-debt. See 44 Geo. III. c. 3. by which the company are allowed to pay the same interest on these bonds as are paid by government on exchequer bills.

Having said thus much relative to the rise and progress of the company, it may not be unacceptable to state shortly the mode of what may be called its internal economy.

The books of the company are at all times open for the admission of every description of persons, natives or foreigners, who may desire to become members, and have money to adventure. It knows no distinction of professions, religions, or even sexes; and in the general courts there is the most perfect equality; every one present has the same right with another to speak his sentiments, and give his advice. A difference is made only in voting; which, when taken by the holding up of hands, requires 500l. stock, and when by ballot, 1,000l. stock for a single vote; 3,000l. for two votes; 6,000l. for three votes; and 10,000l. for four votes, which is the largest number of votes any member is allowed to possess; 2,000l. stock qualifies any member to become a candidate for the office of a director or chairman.

In the beginning of the year 1794, the number of votes was about 1,700; that of actual voters however not much exceeding 1,400. The number of votes has probably increased since that time.

A proprietor of stock to the amount of 1,000l. whether man or woman, native or foreigner, has a right to give a vote in the general courts. The directors are twenty-four in number, including the chairman and deputy chairman, who may be re-elected in turn, six each year for four years successively. See post, IV. The meetings of courts of directors are to be held at least once a week, but are commonly oftener, being summoned as occasion requires. Out of the body of directors are chosen several committees, who have the peculiar inspection of certain branches of the company's business; as the committee of correspondence; a committee of buying; a committee of treasury; a house committee; a committee of warehouse; a committee of shipping; a committee of accounts; a committee of lawsuits; and a committee to prevent the growth of private trade. And under stat. 33 Geo. III. c. 32. a committee of secrecy. See post, IV.

The bulk of the company's exports consists of camblets, cloth, and other woollens; metals; (particularly tin, lead, and copper;) naval and military stores; and silver in bullion.

The company reserved to themselves the exclusive export of cloth, woollens, copper, bullion, and military stores; and also clocks, toys, and other articles ornamented with jewels.

Other articles exported from hence are chiefly purchased in India by Europeans, for their own consumption, and are carried abroad (in what is called private trade) by the commanders and officers of the company's ships. The company may license whom they please to trade in the East Indies. The officers and subordinates of their ships, being thirty in number for every ship, are allowed the benefit of it, both in export and import, according to
their different ranks. This is called private trade; and what they pay for this permission, and in lieu of freight, is called company's duties, and forms an article of the company's profits. The servants abroad are also frequently permitted to remit home their fortunes in merchandise, for which they pay a freight to the company. This latter trade is distinguished from the former by the name of privileged trade.

Besides this, abundance of British goods are sent to India by illicit trade carried on directly from Great Britain; and also by clandestine trade from various parts of Europe, in British ships under foreign colours.

See the stat. 33 Geo. III. c. 52. post, IV. in the 4th, 5th, and 6th divisions of the act as there arranged.

The goods imported by the company from India, consist chiefly of muslins, calicoes, and other piece goods, raw silk, cotton, indigo, pepper, salt-petre, opium, and various sorts of drugs; and from China, tea, coffee, and Japan and china-ware; the other articles are comparatively of a trifling value. Sugar has occasionally been imported in small quantities, but being at present (January, 1794) subject to a heavy duty, it is in effect nearly prohibited.

The whole average amount of the customs and inland duties on the import trade of India and China to Great Britain, may be estimated at upwards of a million per annum; and the sale amount thereof at nearly six millions per annum.

III. The temporary rights of the company, consist; 1st. Of the sole and exclusive trade with India, and other parts within the limits already described; so that none other of the king's subjects can go thither or trade there except it be by leave of the company; or pursuant to the directions of stat. 33 Geo. III. c. 52. post, IV. 2dly. They have the administration of the government and revenues of the territories in India, acquired by their conquests during their term in the exclusive trade; subject nevertheless to the various checks and restrictions contained in the several statutes, which vest that administration in them.

The rights which the company possess in perpetuity, are, to be a body corporate and politic, with perpetual succession. See stats. 3 Geo. II. c. 14. 17 Geo. II. c. 17. 21 Geo. III. c. 65. To purchase, acquire, and dispose at will of lands and tenements in Great Britain. In their charter of 10 W. III. the value in Great Britain was not restricted; but by stat. 3 Geo. II. c. 14. § 14. the value therein is not to exceed 10,000l. per annum. By the charter of King William, to make settlements to any extent, within the limits of their exclusive trade; build forts and fortifications; appoint governors; erect courts of judicature; coin money; raise, train and muster forces at sea and land; repel wrongs and injuries; make reprisals on the invaders or disturbers of their peace; and continue to trade within the same limits, with a joint stock for ever; although their exclusive right of trading shall be determined by parliament. See the three statutes immediately above cited; and as to the forces, stats. 27 Geo. II. c. 9. 1 Geo. III. c. 14. 21 Geo. III. c. 65. 28 Geo. III. c. 3. explained by stat. 31 Geo. III. c. 10. and 39 Geo. III. c. 10.
These rights, it appears, the company hold under the immediate authority of parliament; they embrace all those of the old chartered company which subsisted from the year 1600 to 1708, when, as has been already observed, they became vested or absorbed, with all their fortresses, settlements and factories, and other property, real and personal, in the present United Company. They are a perpetual corporation; and although their exclusive right to the trade, and their power of administering the government and revenues of India were to be determined, they would still remain an incorporated company in perpetuity; with the exclusive property and possession of Calcutta and Fort William, Madras and Fort St. George, Bombay, Bencoolen and St. Helena, and various other settlements and landed estates in India; and also a right of trading thither, with a joint stock; together with all their repositories and other conveniences adapted to their commerce and the preservation of their merchandise, both abroad and at home.

The only privileges they can be constitutionally deprived of, are, those of trading to the exclusion of others, and of governing the countries and collecting and appropriating the revenues of India; Sec. post. IV. and the statutes there cited and abridged.

IV. The statutes now in force relative to the trade and concerns of the East-India Company, but which it does not seem expedient to state at large, are, stat. 9 & 10 W. III. c. 44. § 69. by which persons trading to the East Indies, are first to give security for causing all goods laden on their account in India, to be brought, without breaking bulk, to some part of England or Wales, and there to be unladen and put on land. See Camden v. Anderson, 6 Term Rep. K. B. 723. 1 Bos. & Pell 272. The amount of this security is regulated by stat. 6 Ann. c. 3. Stat. 7 Geo. I. c. 5. § 32, 33. enabling the company to borrow money on their common seal. By stat. 25 Geo. II. c. 26. which is now expired insurance of ships trading to India, under foreign commissions, was prohibited. Stat. 7 Geo. III. c. 49. § 1. as to making dividends; and § 3. as to ballots. See also on the same point, stat. 10 Geo. III. c. 47. § 3. The said stat. 10 Geo. III. c. 47. in § 4. &c. declares, that crimes and oppressions against his majesty's subjects in India, may be punished by information in the court of K. B. in England. Stat. 12 Geo. III. c. 54. as to building new ships. Stat. 17 Geo. III. c. 8. as to the time of electing directors. Stat. 21 Geo. III. c. 70. regulating in several particulars the power of the supreme court at Fort William; and of the governor-general and council of Bengal.

By the stat. 13 Geo. III. c. 65. "for establishing certain regulations for the better management of the affairs of the company, as well in India as in Europe," considerable alterations were made in the constitution of the company. It was enacted that the court of directors should in future be elected for four years; six members annually; but none to hold their seats longer than four years. That no person should vote at the election of the directors, who had not possessed their stock twelve months. This stat. also increased the qualifications for a vote from 500l. to 1,000l. (See ante, II.) The statute ordained that the mayor's
court of Calcutta should in future be confined to small mercantile causes, to which only its jurisdiction extended before the territorial acquisitions. That in lieu of this court, a new one should be established at Fort William, under the title of the supreme court of judicature, consisting of a chief justice, and three puisne judges: and that these judges be appointed by the crown. That a superiority be given to the presidency of Bengal, over the other presidencies in India. That the power of nominating and removing the governor-general and council at Fort William and Bengal, should be vested in the directors. [By stat. 26 Geo. III. c. 23, it is declared that his majesty's approbation of the appointment of the governor-general and council of Fort William, is not necessary.]

By 37 Geo. III. c. 142, and 39 & 40 Geo. III. c. 79, further regulations were made as to the court at Calcutta, and for establishing courts of judicature at Madras and Bombay. Under these several acts the salaries of the judges are settled, and certain pensions are secured to them on their return to Europe. By 41 Geo. III. st. 2, c. 58, the governor and council at Madras and Bombay were empowered to make rules and orders for the better government of those settlements, by appointing justices of the peace, &c.

By stat. 24 Geo. III. sess. 2, c. 25, three things were intended: 1. The establishing a power of control in Great Britain, by which the executive government in India is connected with that over the rest of the empire.—2. The regulating of the conduct of the company's servants in India, in order to remedy the evils that had prevailed there.—3. The providing for the punishment of crimes which might reflect disgrace upon Great Britain.

1. Six persons are to be nominated by the king, as commissioners for the affairs of India, of whom one of the secretaries of state, and the chancellor of the exchequer for the time being shall be two, and the president is to have the casting vote equally divided. (See post. stat. 33 Geo. III. c. 52. div. 1. New commissioners are to be appointed at the pleasure of the crown. The members of this board of control are sworn to execute the several powers and trusts reposed in them without favour or affection, prejudice or malice. The court of directors are to deliver to this board, for their approbation or alteration, all minutes, orders, and resolutions of themselves, and of the courts of proprietors; and copies of all letters, orders, and instructions proposed to be sent abroad. None to be sent until after such previous communication on any pretence whatever. The directors are to appoint the servants abroad, but power is given to the king by his secretary of state, to recall the governors and members of the councils, and all inferior magistrates. The council of Bengal are subjected to the direction of the company at home; and in all cases, except those of immediate danger and necessity, restrained from acting without orders from England.

Another object of this act is to redress the grievances of the natives of India; to provide for the payment of the debts of the Nabob of Arcot, which are a burden on his country; discriminating at the same time those which were justly incurred from those which were forced upon him by the injustice and extortion of British
oppressors; to ascertain the indeterminate rights and pretensions, on which so many differences arose between him and the Rejah of Tanjore; and to deliver the zemindars, and other native landholders of India, from oppression; and to secure to them their possessions by permanent rules of moderation and justice. (See also stat. 26 Geo. III. c. 16.)

2. A material part of this bill is directed also against the abuses said to have prevailed in the civil and military departments; enjoining a thorough revival of their establishment, together with the suppression of such places as are found to be useless, and of such expenses as may be conveniently avoided. And in order to prevent any delusive show of retrenchment, or any future deviation, this reform is directed to be constantly submitted in its whole estate and progress to parliament. (See also stats. 28 Geo. III. c. 31 Geo. III. c. 10.)

Cadets and writers were heretofore sent to India in such numbers as to remain a burden upon the company’s establishments. These are reduced to a certain complement not to be exceeded.

A system of succession by seniority is established by the act, to prevent the servants of the company from rising merely through interest without merit; leaving however to the councils abroad the power of bringing forward, for reasons to be by them assigned, any persons of extraordinary merit or capacity. (See post, stat. 33 Geo. III. c. 52. div. 3.)

3. Security having been heretofore derived to delinquents in India, from the circumstance of their offences being committed within the territories of Indian princes, so as not to come within the cognisance of the British government; this act provides against such evasions in future, by declaring the offence equally punishable, in whatever territory of India it is committed. The act of receiving presents, is declared to be in itself extortion, and punishable accordingly. The offences of disobeying orders, and bargaining for offices, are pronounced to be misdemeanors; and it is provided that offenders shall not compound for them with the company; nor ever be restored to appointments in their service. Collectors and receivers are bound by oath not to receive any private gratuity over and above the legal tribute.

With a view to prevent, or more easily punish, the misconduct of the company’s servants, several regulations were made by this statute for the discovery of their property on their return to England from India; but which were all repealed by stat. 26 Geo. III. c. 57. § 31.

The attorney-general or court of directors may exhibit an information against any person guilty of the crime of extortion, or other misdemeanors committed in the East Indies, after January 1, 1785, which information is to be tried by commissioners selected from both houses in parliament.

The election of these commissioners is regulated by stat. 26 Geo. III. c. 57. which in substance directs as follows: The lords are to ballot for twenty-six of their house, and the commons for forty of their number: their names are again to be put into a box to be drawn out by lot, in presence of three judges, (one of the court of K. B. one of C. P. and one of the exchequer,) and of the parties; and the defendant may peremptorily challenge thirteen peers.
and twenty commoners, and he, as well as the prosecutor, may challenge as many as they please for cause shown. The first five names of the peers, and the first seven names of the commoners, which shall be drawn without challenging, shall be returned by the three judges to the lord chancellor, to insert their names, with those of the three judges, in a special commission, for them, or any ten of them, of whom one of the judges always to be one, to hear and determine every such information, and pronounce judgment thereon; such judgment to be enforced by the authority of the court of K. B. and to be effectual and conclusive to all intents and purposes whatsoever. This, as well as the former act also, contains many other directions relative to the trial, as also relative to the dispensing justice, both in criminal and civil cases in India.

The above stat. 24 Geo. III. st. 2. c. 25. is explained by stat. 28 Geo. III. c. 8. as to the forces, (see ante, III. and stat. 31 Geo. III. c. 10.) the annual accounts, (ante, II.) and the power of the commissioners as to salaries and gratuities.

The stat. 33 Geo. III. c. 32. the commencement of which in India is appointed to take place on the 1st of February, 1794, being of the greatest importance on this subject, that and all the subsequent explaining statutes are here presented in the form which seemed best adapted to elucidate the purposes for which they were passed. As it concerns—1. The control in Great Britain.—2. The governments abroad.—3. Patronage, and rule of promotion.—4. The general trade.—5. Limitations on the exclusive trade to and from India.—6. What shall at present be deemed illicit or clandestine trade.—7. Appropriations of the company's revenue.—8. The method of suing for forfeitures and penalties, and proceedings as to seizures.—9. Regulations of general justice in India.—10. The statutes repealed.—11. Regulations as to the directors, and the company's concerns in England.

1. The act 33 Geo. III. provides for the continuation of the board of control in all its parts; except that the person first named in the king's commission is to be president; and instead of the commissioners being limited to six privy councillors, the number is indefinite, resting in the king's pleasure; of which, however, the two principal secretaries of state, and the chancellor of the exchequer, are to be three; and his majesty may, if he pleases, add to the list two commissioners not of the privy council.

The king may give 5,000l. a year among such of the commissioners as he pleases; which, together with the salary of the secretary and officers, and other expenses of the board, are to be paid by the India company, and not, as formerly, by the civil list; the whole not to exceed 16,000l. per annum.

Oaths are prescribed for the commissioners and their officers. The office of a commissioner, or chief secretary, is not to be deemed a new office to disable them from sitting in parliament. Nor is the appointment of a commissioner not having a salary, or of a chief secretary, to vacate a seat. Three commissioners must be present to form a board.

The powers of the board are, in substance, the same as under former acts of parliament. They are to superintend, direct, and
control all acts, operations, and concerns, which relate to the civil or military government and revenues of the British territorial possessions in India, subject to the restrictions after mentioned. They and their officers are to have access to the papers and records of the company, and to be furnished with copies or extracts of such of them as shall be required. They are also to be furnished with copies of all proceedings of general courts, and courts of directors, within eight days; and with copies of all despatches from abroad, relating to matters of government or revenue, immediately after their arrival. No orders on those objects are to be sent by the company to India, until approved by the board; and when the commissioners vary or expunge any part of the despatches proposed by the directors, they are to give their reasons; and all despatches are to be returned to the court of directors in fourteen days. The directors may state their objections to any alterations, and the commissioners are to reconsider them; and if they interfere with what the directors deem matters of commerce, the directors may apply to the king in council to determine between them. But the board are restricted from the appointment of any of the company's servants. If the directors, on being called upon to propose despatches, on any subject relating to government or revenue, shall fail to do so within fourteen days, the board may originate their own despatches on that subject.

The board are not to authorize any increase of salaries, or any allowance of gratuity to be granted to persons employed in the company's service, except the same shall be first proposed by the company; and their intention and reasons for such grant are to be certified to both houses of parliament, thirty days before the salary can commence.

The directors are to appoint three of their members to be a committee of secrecy, through whom despatches relating to government, war, peace, or treaties, may be sent to and received from India. This committee and their clerks to be sworn to secrecy.

Orders of directors concerning the government or revenues of India, once approved by the board, are not subject to revocation by the general court of proprietors.

2. The forms of government over the presidencies of Bengal, Fort St. George, and Madras, are continued in all their essential parts. For Bengal, by a governor-general and three members of council. For each of the others, a governor and three members. These latter, with respect to treaties with the native powers of India, levying war, making peace, collecting and applying revenues, levying and employing forces, or other matters of civil or military government, are to be under the control of the government-general of Bengal; and are in all cases whatever to obey their orders; unless the directors shall have sent to those settlements any orders repugnant thereto not known to the government-general; of which, in that case, they are to give the government-general immediate advice.

The court of directors are to appoint to these several governments; namely, the governor-general, the two other governors, and the members of all the councils; and likewise the commander
in chief of all the forces, and the three provincial commanders in chief. None of the commanders in chief are, ex officio, to be of the council, but they are not disqualified from being so if the directors shall think fit to appoint them; and, when they are members of the council, they are to have precedence of the other councillors. The civil members of council are to be appointed from the list of civil servants who have resided twelve years in the service in India.

The directors may appoint to any of these offices provisionally but without salary, till the persons appointed shall actually succeed in possession. Any vacancy of governor-general, or governor, when no provincial successor is on the spot, is to be filled by the senior of the civil councillors till a successor shall arrive; and the vacant seat in council thereby occasioned, shall be temporarily supplied from among the senior merchants, at the nomination of the acting governor-general, or governor, if only one councillor shall then remain; and on other occasions, the governor-general and governors may supply vacancies in council from the list of senior merchants, until successors duly appointed shall arrive to take their seats. In all these cases, the salaries and allowances are to follow the acting members while in office. If the directors fail to appoint to vacancies in two calendar months, after notification thereof, the king may supply them, and the directors shall not remove any person so appointed. In all other cases, the directors have the power of recalling or dismissing any servants; and the like general power is vested in the crown. Appointments made before the act, not to be disturbed.

The commander in chief of all the forces, when at either of the subordinate settlements, is to have a seat at the council board, but is to have no salary in respect thereof; and if the provincial commander is a member of that council, he may continue to deliberate, but his voice shall be suspended as long as the other shall remain.

Provision is made for supplying the place of any member of council disabled from attending by illness.

The departure of any governor, or member of government, or commander in chief, from India, with intent to come to Europe, or any written resignation delivered in by them, shall be deemed an avoidance of office, and the coming into any part of Europe shall be a sufficient indication of that intent. No salary shall be payable to any officer or his agent during absence, unless employed on actual service; and if any officer, unless absent on service, never returns, the salary is to be deemed to have ceased from the day of his quitting the settlement.

The act prescribes the order and method of conducting business at the several council boards. Powers are given to the governor-general, or governor, to act contrary to the opinions of the other members of council, taking upon themselves the sole responsibility.

Provision is made in case of the absence of the governor-general, and his visiting any subordinate presidency; and in case he shall be in the field without a council, all the governments and officers shall obey his orders, and he alone shall be responsible.

By 45 Geo. III. c. 36. the court of directors may appoint the commander in chief on the Bengal establishment to be a member
of the council of Fort William there, notwithstanding the office of
governor-general of Fort William, and that of commander in
chief of all the forces in India, shall be united in the same person.
The same act provides, that such commander shall have rank at
the board next to the governor-general, but shall not succeed to
the government in case of vacancy, unless he shall have been pro-
visionally appointed to supply the same; but such vacancy shall
be supplied by the councillor next in rank.

All the governments are, by the act 33 Geo. III. c. 52. laid under
restrictions to prevent war or extension of dominion in India,
unless hostilities against the company or their allies shall render war
unavoidable. The members of subordinate governments, acting
contrary to this act, or to the directions of the government-general,
may be suspended or dismissed by that government, and further
punished. The subordinate presidencies are also required to
communicate all matters of importance to the superior govern-
ment with all despatch.

The governor-general, and other governors, are vested with
powers of apprehending persons suspected of illicit correspond-
ence with the enemies of the company or of Great Britain. Wit-
tesses are to be examined, and cross-examined, and their evidence
recorded; and the parties may either be tried in India, or sent
home; in the latter case, the depositions of the witnesses are also
to be sent home, and are to be received in evidence, subject to
impeachment in respect to the competency of the witnesses.

To the acting president of the several council boards is given a
casting vote in all cases of equality of voices.

By 42 Geo. III. c. 29. the company were authorized to reduce
their settlement of Fort Marlborough (at Bencoolen in Sumatra,) to
a factory, subordinate to the presidency of Fort William in Ben-
gal: the servants, who thereby became supernumerary, were, under
the act, transferred to Fort St. George.

3. The directors are to appoint so many cadets and writers only,
as to supply vacancies according to returns from abroad. Their
ages to be from fifteen to twenty-two; unless any cadet shall have
been one year in the king’s service, and then his age is not to
exceed twenty-five years.

All shall have promotion by seniority of service only. Three
years’ service qualifies a civil servant for a place of 500L a year—
six years for one of 1,500L—nine years 3,000L—twelve years 4,000L
or upwards. None to take two offices where the joint emoluments
shall exceed this rule. (See ante, stat. 24 Geo. III. c. 25. div. 2.)

By 47 Geo. III. stat. 2. c. 68. § 7. two years of the time spent in
the college established by the company in England, by persons
above seventeen years old, shall be reckoned as time spent in India.

Nearly the same regulations are made by 33 Geo. III. c. 52. re-
lative to receiving presents, disobedience of orders, and bargaining
for offices, as have been already mentioned in stat. 24 Geo. III. c.
25. div. III. All the king’s subjects are made amenable to all
courts of competent jurisdiction abroad and at home for all crimes
committed by them in India. The company may compound civil
actions, but are absolutely restricted from compounding or remit-
ting any judgment or sentence whatever in criminal cases.

Servants of the company, (under the degree of a member of coun-
cil or commander in chief) after five years' absence, cannot return with their rank, nor serve again, unless detained by sickness, or unless it be by leave of the company, on a ballot of three parts in four of the general court. In case of sickness, the directors are the judges in the civil service; and in the military, the directors and the board of control jointly.

4. The company's term is extended for twenty years, from March 1, 1794, subject to be determined at or after that period, on three years' previous notice by parliament, signified by the speaker of the house of commons; subject, however, as to the trade to and from India to the following limitations, in favour of such private merchants as may choose to trade there. In other respects, and to and from China, and other places beyond the Cape of Good Hope, the former restrictions against private traders are continued in force; and if the exclusive trade, thus limited, shall be hereafter discontinued, the company are still to retain their corporate capacity, with power to trade with a joint stock, in common with other persons. If, however, any new settlement shall be obtained from the Chinese government, separate from the continent of Asia, an export trade thither is preserved to private merchants under certain regulations; and there is also a clause to preserve to the southern whalers the benefit of their carrying trade into the Pacific Ocean, by the way of Cape Horn, to the northward of the equator, limited to 180 degrees west longitude of London: and ships from Nootka Sound are to be licensed to trade from thence with Japan and China; but are not to bring any goods of the produce or manufacture of those countries to Great Britain. See ante, III.

By 35 Geo. III. c. 115. (continued by 42 Geo. III. c. 20 § 6, during the continuance of the company's exclusive right of trade under 33 Geo. III. c. 52.) the importation of goods from India and China, and other parts within the limits of the company's trade, is allowed in ships not of British built, or registered as such, having been taken up and employed in the East Indies on account of the company; and the same ships are allowed also to export goods to the East Indies as British built ships.

By 42 Geo. III. c. 17. British built ships are permitted to carry on the fisheries in the Pacific Ocean, which may pass through the straits of Magellan, or round Cape Horn, &c. without license from the East-India company or the South Sea company.

5. All persons may export and import goods to and from India, in the company's ships; except that they shall not export military stores, ammunition, masts, spars, cordage, anchors, pitch, tar, or copper; nor import India calicoes, dimities, muslins, or other piece goods, made or manufactured with silk or cotton, or with silk or cotton mixed, or with other mixed materials, unless it be done by leave of the company. If the market shall not be sufficiently supplied with excepted articles of import or export, (with an exception of military stores and copper,) the board of control may open that trade also to individuals. If the company should not export 1,500 tons of copper annually, private traders may export copper, in the company's ships, to the amount of the deficiency.

The company are to furnish private traders, till 1796, with 3,000 tons of shipping yearly, computed on the same principle as the company's own tonnage is computed. The quantity may be in-
creased by order of the board of control, to meet the demands of the private traders; and if the board order more than the company approve, they may appeal from the order to the king in council. And the company are restricted from charging any higher freight than 5s. per ton outwards, and 15s. per ton inwards; except in time of war, or in circumstances incidental to war, or preparations for war, when they may charge an increased rate of freight, in a due proportion to the rates at which they shall take up their own shipping, but the proposed increase can only be made by the consent of the board of control; before whom the directors are also required, in 1794, and every third year afterwards, to lay a statement of the affairs of shipping; and to abide by their order, touching any continuance, increase, or abatement of the rate of freight on private trade.

Private traders are required to notify to the company's secretary at home, and to the proper officers in India, at a time limited, the quantity of tonnage wanted by them for the ensuing season, with the place of destination, and the time when the goods will be ready for shipping. At home, this notice is to be given before the 31st of August for the ships of the ensuing season, and before the 15th of September they are to deposit the sum for the tonnage, or give security to the directors for payment of it. Before the 30th of October they are to deliver a list of the sorts and quantities of the goods intended to be sent. In failure of having them ready, by the day specified in the notice, they are to forfeit their deposit, or the security, and also their tonnage for that term. Similar rules are prescribed for shipping goods, &c. in India; but it is left to the governments there to fix the times, and to name the officers, to whom notices are to be given. The company is to have the benefit of all forfeited and vacant tonnage, and if more is demanded for private trade than the quantity limited, every person is to have his due proportion; and notice is to be given him thereof seven days before the day for making the deposits. All private trade is to be registered in the company's books, and, in default of being registered, it is to be considered as illicit trade, and punishable accordingly.

The restrictions of the law against the company's servants, or others, from acting as factors for foreigners, or lending money to foreign companies, or on bottomry of their ships, or assisting them with remittances by bills, are repealed. And all legal impediments to the recovery of debts, under any pretence that they were incurred illicitly, and against the letter of these abrogated laws, are removed; and all persons in India, not specially prohibited by the company, or restricted by their covenants, are authorized to act as mercantile agents for any who may choose to employ them; and if there shall be a want of factors (properly qualified and authorized) the company are to license free merchants, with the approbation of the board of control, so that there may be always a proper supply of agents for conducting the private trade abroad. But the becoming factors is not to exempt any persons from being amenable to the general authorities of the governments in India; and all agents are restricted from going beyond ten miles from some principal settlement without special leave.

As a further relief to private traders, the duty of 5 per cent. granted by an act of King William, on goods imported in private trade,
is, in respect to the India trade, repealed; and the company's former charge of 2 per cent. discontinued; and in lieu of these, and in satisfaction of the expenses of unshipping, voyage, cartage, warehouse-room, sorting, lotting, and selling private goods, the company is to have 3l. per cent. on the gross amount of the sales of private trade, the customs thereon included. The repeal of the allowance thus substituted, is however not to extend to special engagements made between the company and any of their officers touching their privileges.

For the case of manufacturers, who may import any articles of raw materials, rules or by-laws are to be framed and established for bringing them to as early a sale as possible; and for preventing any undue preference in the sales of the same commodity amongst any of the importers, whether the goods belong to the company or to individuals, the sales are to be open and public, by inch of candle, and the whole consignment, bought in by the private importer, is to be delivered out to him, on payment only of the duties and other dues thereon. All other goods imported in private trade are to be sold and treated as heretofore, according to the by-laws of the company; and all goods in private trade are to pay to government the same customs as goods imported by the company on their own account.

And inasmuch as the allowance of 3 per cent. and the rates of freight, will be insufficient to indemnify the company their actual charges upon private trade, the legislature has exempted the company from actions for losses or embezzlements, which a common carrier might, in ordinary cases, be liable by law to make good to the owner. But the act provides that the company's officers, and all persons through whose means or negligence any loss shall happen, shall be liable to make it good to the owner; and it gives a further remedy to the owner in certain cases, to recover satisfaction by enabling him to prosecute under the written engagements or securities taken by the company for the safe keeping of their own merchandise. All the laws prohibiting the import of goods from any other place than that of their growth, and for continuing all prohibitory laws, in respect to the consumption or wearing of foreign manufactures, are continued. (See tit. Navigation Acts.)

By 37 Geo. III. c. 97. § 22. the United States of America were allowed to trade to the British territories in India, conformable to the treaty of commerce with America, and during that treaty.

By 37 Geo. III. c. 117. vessels of friendly countries may import into, and export from, the British possessions in India, goods permitted by the East-India directors, not contrary to treaties or law.

6. All the old laws for preventing clandestine trade with India, and from lending to, or assisting, or being concerned with, foreign companies, or foreign traders, are wholly abrogated, and the following provisions are substituted in their place; observing that the penalties are made to extend only to such of his majesty's subjects as belong to Great Britain, Guernsey, Jersey, Alderney, Sark, Man, Faro Isles, or to the colonies, islands, or plantations in America or the West Indies; and that all vessels and goods forfeited may be seized by any of the company's officers in India or China.

Persons going unlawfully to India, and trafficking there, forfeit ships, vessels, goods and merchandise, and double the value there-
of; one-fourth to the informers, and three-fourths to the company; they paying thereout the costs of prosecution.

Persons unlawfully going to India, shall be deemed unlawful traders, and subject to the foregoing penalties and forfeitures, and may also be prosecuted as for a crime and misdemeanor, and be liable to fine and imprisonment. One moiety of the fine goes to the king, the other to the company, if they prosecute, or else to any other informer.

Persons unlawfully resorting to India, may be seized and sent home for trial; and, on arrival, they are to give bail, or be committed to prison.

Persons dismissed the service, or whose licensees shall have expired, if they continue in India, are to be considered as illicit traders, and are made subject to penalties and forfeitures of goods, &c. as such.

Goods shipped clandestinely, or such as are restricted by the act, and goods unshipped at sea, shall be seized and forfeited, with double the value; and the master, or other officer, knowingly permitting or suffering the same, shall forfeit all his wages to the company; to be deducted out of the money payable to the owners, and be disabled from again acting in the service.

Any who shall solicit for, or accept a foreign commission to sail to, and trade in, India, shall forfeit 500l. half to the company, and half to the prosecutor, or the whole to the company, if they shall prosecute.

All governors and councillors are prohibited from trading, except for the company; and all collectors, supervisors, and others employed in the revenues of Bengal, Bahar, and Orissa, or their agents, or any in trust for them, are prohibited from inland trade, except for the company. The judges of the supreme court of judicature in Bengal, are absolutely prohibited from traffic; and none, without the permission of the company, shall trade in salt, beetle-nut, tobacco, or rice, on pain of forfeiture of the goods, and treble the value, one moiety to the company, and the other to the prosecutor.

None shall send goods from India to the continent of Europe by any other channel than as allowed by the act, on pain of forfeiture of double the value; but this restriction is not to extend to matters of agency, only on the account bonâ fide of any foreign company, or foreign merchant. See div. 5.

7. Appropriation. First in India. The territorial revenues are to be applied, in the first place, in defraying all charges of a military nature. Secondly, in payment of the interest of the debts there already, or hereafter to be, incurred. Thirdly, in payment of the civil and commercial establishments. Fourthly, in payment of not less than one million per annum for the company's investments of goods to Europe, and remittances and investments to China; and the surplus, if any, is to be applied in the discharge of debts, or such other purposes, as shall be directed from home.

The sum allowed for investments may, from time to time, be increased to the extent of the diminution made in the annual amount of the interest of debts which shall be paid in India; or transferred home; for which transfer, provision is made to an extent of 300,000l. a year, by bills of exchange to be drawn upon the com-
pany; and if the creditors shall not subscribe to that amount, other persons may subscribe, and the money advanced by them for bills is to be applied in discharge of such debts, and this rule is to be continued till the India debts shall be reduced to two millions. The company may increase these transfers home, but the governments abroad are restricted from exceeding the above amount without their orders. (See stat. 34 Geo. III. c. 41.)

Secondly at home. The net produce of the company's funds at home, after payment of current charges, are thus appropriated. First, in payment of a 10 per cent. annual dividend, on the present, or any increased amount of the capital stock of the company. Secondly, of 500,000l. per annum, to be set apart on the first of March, and the first of September, half yearly; and applied in the discharge of the before-mentioned bills of exchange, for the aforesaid reduction of the India debt. Thirdly, of a like annual sum of 500,000l. to the exchequer, to be applied by parliament for the use of the public, and to be paid on the first of January, and the first of July, half yearly, by equal instalments. And, lastly, the surplus may be applied in the more speedy reduction of the India debt, till reduced to two millions, or in discharging debts at home, so as not to diminish the bond debt below 1,500,000l. Subject to these appropriations, and after the debt in India is reduced to two millions, and the bond debt at home to 1,500,000l. (See ante, II.) one sixth part of the ultimate surplus is to be applied to an increase of dividend of the capital stock, and the remaining five-sixths is to be made a guaranty fund, or collateral security for the company's capital stock, and their dividend of 10 per cent. until such fund, by the moneys paid by the company, and the interest thereof, shall have amounted to twelve millions; and, after that time, the said five-sixths of the surplus is to belong to the public in full right. These five-sixths are to be paid into the bank, and laid out in the purchase of redeemable annuities, in the names of the commissioners for the reduction of the national debt, who are also to receive the dividends, and lay them out in like manner, until twelve millions have been invested. That being accomplished, the annual dividends of the stock purchased therewith, are, in the first place, to make good any defalcation in the company's revenues, to pay the 10 per cent. dividend, and subject thereto, those dividends are to belong to the public. If, on the company's exclusive trade being determined, their own assets shall prove insufficient to make good their debts, and also their capital stock rated at 200 per cent. the excess of such guaranty fund is to make good the deficiency, as far as it will extend; and in the event of the company discontinuing their trade altogether, the excess is to belong to the public. But if the company shall continue to trade with a joint stock, then the overplus, and the annual dividends thereof, are to remain as a like guaranty for a dividend of 10 per cent. and for the capital rated at 200l. per cent. as long as the company shall trade with a joint stock; but, subject to the making good any such deficiencies, the said fund is to be deemed the property of the public.

If the bond debt at home, or the debts abroad, after being reduced to the sums before limited, shall be again increased, the former appropriation is to be revived until those debts shall be again diminished to their respective standards before limited.
Any deficiency in the funds to make good the 500,000l. to the exchequer in any year, is to be made good in the excesses of subsequent years; unless it happens in time of war, or by circumstances incidental to war; in which case the deficiencies are not to be carried forward as a debt on the annual funds of the company, nor to be brought forward as a debt to be paid by the company, unless only in the event of their assets, on the conclusion of the exclusive trade, affording more than sufficient to make good the capital stock rated at 200l. per cent. but any excess of such assets, beyond that amount, is liable to make good the deficiency of any such payments to the public; no interest is to be computed in the mean time on such deficiency.

The securities given by the cashiers of the bank are to extend to the moneys they may receive under this act, and the treasury is to direct the allowances for management; and if the company make default in any payments directed by the act, they may be sued, and shall pay 15l. per cent. damages, with costs of suit.

The statute directs the manner in which receipts shall be given; and a power is lodged in the treasury to give the company further time for payment in cases of exigency. And it is declared that neither the claims of the public, nor of the company, to the territories in India, shall be prejudiced by the statute, beyond the prolongation of the term in the exclusive trade. The statute also contains a clause of mutual acquittal of all outstanding demands between the crown and the company, to the 24th day of December, 1792.

The statute recognises the rights of the company to a sum of 467,896l. 7s. 4d. in money, and 9,750l. East-India stock; (which sums constitute the separate fund of the company, established under the act of 1781;) and it is observed, that it will be more for the general interest of the company to continue that money employed in trade, computing an interest upon it, and to make it a fund for a permanent increase to their dividend of 10s. per cent. than to draw it from their trading capital for any sudden distribution. And it then authorizes and limits the company to make a dividend from this separate fund, and the interest thereof, after the rate of 10s. per cent. per annum, during their further term in the exclusive trade; and, at the end of the term, it gives them a power of disposing of the remainder of this fund as they shall think fit.

The company are not to grant any pensions or new salaries beyond 200l. per annum, to any one person, without the consent of the board of control; and they are to lay before parliament, annually, a list of all their establishments abroad and at home, in which all pensions and new salaries are to be particularly noticed; and also complete accounts of all their affairs, receipts and outgoings of the preceding year, with estimates for the following year.

3. The statute gives a right of suing by action, bill, or information, in any of the courts of Westminster, (in which case the venue is to be laid in London or Middlesex,) or in the supreme court of judicature in Bengal, or the mayor’s court at Madras or Bombay; and in such suits the legality of seizures of persons, ships, or goods, is made cognisable. In cases of misdemeanors, the offenders are punishable by fine and imprisonment; and if
abroad, they may be sent home, as part of the punishment; and a 
capias, for arresting the accused party, is given in the first instance, 
which may be compounded for by bail.

For securing to the crown the duties for goods unlawfully traf-
icked with, in the cases of forfeiture of goods, the attorney-general 
may prosecute the offenders, or their partners, by bills in a court 
of equity, waiving penalties, and the defendants shall make full 
discovery of their illicit traffic upon oath, and shall be decreed to 
pay all the duties thereupon to government, and 30l. per cent. on 
the value of the goods to the company, and shall be relieved 
against all other forfeitures. The company may, in like manner, 
proceed against offenders by bill in equity, and if they fail they 
shall pay costs. Defendants are to pay costs to the crown and to 
the company, when the decree shall be against them. Other 
usual regulations are made as to informers, pleadings, &c.

9. The jurisdiction of the supreme court of judicature at Fort 
William, in causes of admiralty, is made to extend to the high seas 
at large; whereby a defect in stat. 13 Geo. III. c. 63. for constitu-
ting that court, is cured.

For increasing the number of magistrates in Bengal, Madras 
and Bombay, the supreme court of judicature in Bengal is to issue 
commissions of the peace, in pursuance of orders issued in counci1 
for that purpose; and any of the justices, so appointed, may, 
by order in council, sit also in the courts of oyer and terminer, 
taking the oaths of justices in England, (excepting the oath pres-
cribed by the act of the 18 Geo. II. relating to qualification by 
estate.) The proceedings and judgments of justices may be re-
moved to the court of oyer and terminer by certiorari, but cannot 
be set aside for want of form but on the merits only. The jus-
tices may also associate, with the judges in causes appealed, when 
called upon so to do.

The governments abroad may appoint coroners to take inquests 
upon the bodies of persons coming to an untimely end, and ap-
point fees to be paid for that duty.

The justices of the peace may appoint scavengers, and raise 
money by assessments, for cleansing, watching, and repairing the 
streets of Calcutta, Madras and Bombay; they may also license 
houses for retailing spirituous liquors, and fix the limits of these 
towns; and none are to retail spirits but such as they shall so li-
cense, under the penalties of the laws of Great Britain.

By 47 Geo. III. st. 2. c. 68. the governor and council at Madras 
and Bombay, are empowered to make regulations for the good order 
of those towns and their dependencies; subject to the appeal given 
by 13 Geo. III. c. 63. The governor and council at Bombay may 
make regulations for the provincial courts. The governors and 
council of Madras and Bombay are made justices of peace for 
those towns, and empowered to issue commissions to the company's 
 servants to be justices of the peace in the places subordinate 
to the respective councils, without control from the governor-gen-
eral and council at Fort William.

By 37 Geo. III. c. 142. § 28—30. British subjects are prohibited 
from lending any money, or being concerned in raising any, for 
native princes, without the consent of the court of directors, or 
the governor in council at the settlement. Persons offending 
may be prosecuted for a misdemeanor, and the securities are declared
void. See 46 Geo. III. c. 133. for carrying into effect an agreement between the company and the private creditors of the nabobs of the Carnatic.

By 47 Geo. III. st. 2. c. 68. &c. the several governments in India are empowered to establish public banks there: and the company's servants are allowed to subscribe to them. No judge of the courts there can be a director. § 8, 9, 10.


The repeal is not to extend to offences committed before the commencement of the act, nor is it to affect the powers of the former board of control, until a new one shall be appointed; nor to affect the powers given to the board by stat. 26 Geo. III. c. 8. 31 Geo. III. c. 10. concerning the forces in India.

The exclusive right of trading granted to the company by 9 & 10 Wm. III. c. 44. has never been put an end to, and any infringement of it is a public wrong: and though such parts of that act as inflicted penalties, &c. were repealed by 33 Geo. III. c. 52. which enacts that no acts, or parts of acts, thereby repealed, shall be pleaded or set up in bar of any action, &c. it is competent to underwriters, who have subscribed policies on ships trading to the East Indies, in contravention of the statute of William III. to avail themselves of the illegality of such trading in an action brought on the policies. 6 Term Rep. K. B. 723. 1 Bos. & Pulm. 272.

11. By 33 Geo. III. c. 52. a special oath is prescribed to be taken in future by the directors of the company, prohibitory of their acting as directors when concerned in buying from, or selling to, the company any goods; and prohibitory of their being concerned in any shipping employed by the company, or accepting any present for any appointment of office, or of being concerned in any private trade contrary to the act.

By 36 Geo. III. c. 119. and c. 127. the company were empowered to purchase houses and ground to enlarge their warehouses.

By 37 Geo. III. c. 74. they were allowed to pay two regiments of infantry for defence of their houses and warehouses.

By 39 Geo. III. c. 59. (explained by 39 & 40 Geo. III. c. 59. and 41 Geo. III. (U. K.) c. 21.) certain goods imported from the East Indies are permitted to be warehoused in England for exportation, and the duties thereon are regulated.

By 39 Geo. III. c. 89. for regulating the manner in which the company shall hire and take up ships for regular service, it is directed that they shall not employ any ships in their service but such as shall be contracted for for six voyages; and that they shall advertise for proposals for building and freighting ships, and shall accept the lowest terms. This act is explained and modified by the temporary act 43 Geo. III. c. 63. (which is explained by 43
Geo. III. c. 137. and is revived and in force to 25th March, 1813, by 46 Geo. III. c. 85.)

By 39 Geo. III. c. 109. (as combined with the general annual mutiny acts,) the recruiting the forces of the company in England is regulated. Till embarkation they are governed under the mutiny acts; and afterwards, under 27 Geo. III. c. 9. &c. See ante, III.

By 43 Geo. III. c. 83. the company were empowered to defray the expense of volunteer corps raised by them for the protection of their warehouses and property in London.

EASTINTUS, Sax. East-Tyne] An easterly coast or country; also the east street, east side of a river, &c. Leg. K. Edw. I.

EASTLAND COMPANY. This company subsisted under a charter granted by Queen Elizabeth in 1579, for regulating the commerce into the east country; a name anciently given, and still continued by mercantile people, to the ports of the Baltic sea, more particularly those of Prussia and Livonia. They were by this charter to enjoy the sole trade, through the sound, into Norway, Sweden, Poland, Lithuania, (excepting Narva, which was within the charter of the Russian company) Prussia, and also Pomerania, from the river Oder, eastward, Danzig, Libing, and Koningsburgh; also to Copenhagen and Eismore, and to Finland, Gothland, Bornholm, and Oeland. This charter was confirmed by another from Charles I. in 1629.

By the stat. 25 Car. II. c. 7. the following provisions were made for laying open a very considerable part of this trade: It was declared lawful for any native or foreigner, at all times, to have free liberty to trade into and from Sweden, Denmark, and Norway, notwithstanding the charter to the Eastland merchants, or any other charter. And further, that every person, being a subject of this realm, might be admitted into the fellowship of merchants of Eastland on paying 40s. and no more. § 5, 6. Which latter provision made the trade to the other parts within the limits of the charter easily accessible.

EAT INDE SINE DIE. Words used on the acquittal, &c. of a defendant that he may go without day, i.e. be dismissed. See tit. Judgment.

EAVES-DROPPERS. Persons that listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court-leet; or are indigible at the sessions, and punishable by fine, and finding sureties for good behaviour. Kitch. of Courts, 20. 4 Comm. 169. See tit. Good Behaviour.

EBDOMADARIUS, An ebedomadary, or officer appointed weekly in cathedral churches, to supervise the regular performance of divine service, and prescribe the particular duties of each person attending in the choir, as to reading, singing, praying, &c. To which purpose the ebedomadary, at the beginning of his week, drew in form a bill or writing of the respective persons, and their several offices called tabula; whereupon the persons there entered were styled intabulati: This is manifested in the statutes of the Cathedral Church of St. Paul, digested by Dr. Ralph Baldock, dean of St. Paul's, anno 1298, MSS.
ELEBREMORTEX, EBEREMORS, EBEREMURDER, Sax.] Bare or downright murder. Leg. Hen. 1. c. 12. See tit. Aberemurder.

ECCLESIA, Lat.] The place where God is served, commonly called a church: But in law proceedings, according to Fitzherbert, this word intends a personage; so for he expresses it in a question, whether a benefice was ecclesia sive capella, &c. Fitz. N. B. 32. 2 Inst. 363.

ECCLESIA SCULPTURA. The image or sculpture of a church in ancient times, which was often cut out or cast in plate or other metal, and preserved as a religious treasure or relic, and to perpetuate the memory of some famous churches. Mon. Ang. tom. 3. p. 309.

ECCLESIASTICAL, Denotes something belonging to, or set apart for the church; as distinguished from civil or secular, with regard to the world.

ECCLESIASTICAL CORPORATIONS, Are where the members that compose it are spiritual persons. They were erected for the furtherance of religion, and perpetuating the rights of the church. See tit. Corporation.

ECCLESIASTICAL COURTS. See tit. Courts Ecclesiastical.

ECCLESIASTICAL JURISDICTION. By stat. 37 Hen. VIII. c. 17. the doctors of the civil law, although they be hynem, &c. may exercise ecclesiastical jurisdiction.

ECCLESIASTICAL LAWS. See tit. Canon Law, Courts Ecclesiastical.

ECCLESIASTICAL PERSONS, OR ECCLESIASTICS. Ecclesiastici.] Churchmen, persons whose functions consist in performing the service, and keeping up the discipline of the church. See tit. Clergy.

EDESTIA. From ædes, used in some old charters for buildings.

EDA, Aid or help. Thus Du Fresne interprets it; but Cowel says it signifies cæs.

EDICT; edictum.] An ordinance or command; a statute, Lat. Law Dict.

EEL-FARES. A fry or brood of eels. Stat. 25 Hen. VIII.

EFFEERERS. Persons appointed to set and assess fines in courts leet, &c.

EFFORCIALITER, Forcibly; as applied to military force. Mat. Paris, anno 1213.

EFFRACTORES, Lat.] Breakers applied to burglars, that break open houses to steal.

EFTERS, Sax.] Ways, walks, or hedges. Blount.

EFFUSIO SANGUINIS. The mule, fine, or penalty imposed by the old English laws for the shedding of blood, which the king granted to many lords of manors: And this privilege, among others, was granted to the abbot of Glastonbury. Cartular. MSS.

EGYPTIANS. Egyptian. Commonly called Gypsies. These are a strange kind of commonwealth among themselves, of wandering impostors and jugglers, who made their first appearance in Germany about the beginning of the sixteenth century, and have since spread themselves all over Europe and Asia. They were originally called Zinganees by the Turks, from their captain Zin-
ganeus, who, when Sultan Selim conquered Egypt, about the year 1517, refused to submit to the Turkish yoke, and retired into the deserts, where they lived by rapine and plunder, and frequently came down into the plains of Egypt, committing great outrages in the towns upon the Nile, under the dominion of the Turks. But being at length subdued, and banished from Egypt, they dispersed themselves in small parties, into every country in the known world; and as they were natives of Egypt, a country where the occult sciences, or black art, as it was called, was supposed to arrive to great perfection, and which in that credulous age, was in great vogue with persons of all religions and persuasions, they found the people wherever they came, very easily imposed on. *Mod. Univ. Hist.* vol. 43. p. 271.

In the compass of a very few years, they gained such a number of idle proselytes, who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging and pilfering, that they became troublesome and even formidable to most of the states of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591. And the government in England took the alarm much earlier, for in 1530, they are described by stat. 22 Hen. VIII. c. 10. as “outlandish people, calling themselves Egyptians, using no craft or art of merchandise, who have come into this realm, and gone from shire to shire, and place to place in great company, and used great, subtle, and crafty means to deceive the people; bearing them in hand, that they by palmistry could tell men and women fortunes; and so many times by craft and subtility have deceived the people of their money, and have also committed many heinous felonies and robberies.” Wherefore they are directed to avoid [depart] the realm, and not to return under pain of imprisonment, and forfeiture of their goods and chattels; and, upon their trials for any felonies which they might have committed, they shall not be entitled to a jury *de mediata lingua*. And afterwards it was enacted by *Ediz.* c. 20. that if any such persons shall be imported into this kingdom, the importer shall forfeit 40l. And if the Egyptians themselves remain one month in this kingdom; or if any person, being 14 years old, whether a natural born subject or stranger, which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him, or herself like them, shall remain in the same one month, at one or several times; it is felony, without benefit of clergy. And Sir Matthew Hale informs us, that at one Suffolk assises, no less than thirteen gypsies were executed upon these statutes, a few years before the Restoration. But, to the honour of our national humanity, there are no instances more modern than this, of carrying these laws into execution. *Comm.* 165, 166. Now by stat. 23 Geo. III. c. 51. the said act of 5 Eliz. c. 20. is repealed. And the stat. 17 Geo. II. c. 5. (see tit. *Vagrants.*) regards them only under the denomination of rogues and vagabonds.


EJECTA. A woman ravished or deflowered; or cast forth from the virtuous. *Ejectus*, a whoremonger. *Blondi.*

**EJECTIONE CUSTODIÆ. Ejectment de Garde.** Is a writ which lieth against him that casteth out the guardian from any
EJECTMENT.

land during the minority of the heir. Reg. Orig. 162. Fitz. N. B. 139. There are two other writs not unlike this; the one termed *ravishment de gard*, and the other *droit de gard*. See tit. Guardian.

**EJECTIONE FIRME; or EJECTMENT.**

An action at law by which a person ousted or amoved from the possession of an estate for years, may recover that possession: and which action is now used as the general mode of trying disputed titles to lands and tenements. See 3 Comm. 199, from whence the subsequent matter is extracted with addition from other sources.

A writ of *ejectione firme*, or action of trespass in ejectment, lieth where lands or tenements are let for a term of years, and afterwards the lessor, reversioner, remainder-man, or any stranger, doth eject or oust the lessee of his term. Fitz. N. B. 220. In this case he shall have his writ of *ejection* or *ejectment*; to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired and ejecting him. And by this writ the plaintiff shall recover back his term or the remainder of it, with damages.

Since the disuse of real actions, this mixt proceeding is become the common method of trying the title to lands or tenements. It is therefore necessary to delineate its history, the manner of its process, and the principles wherein it is grounded.

The writ of covenant, for breach of the contract contained in the lease for years, was anciently the only specific remedy for recovering against the lessor a term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger claiming under a title superior to that of the lessor, or by a grantor of the reversion, (who might at any time by a common recovery have destroyed the term,) though the lessee might still maintain an action of covenant against the lessor, for non-performance of his contract or lease, yet he could not by any means recover the term itself. Fitz. N. B. 145. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed, by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector, but in damages, by a writ of *ejectione firme*, for the trespass committed in ejecting him from his farm. But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ, nor prayed by the declaration, (which are calculated for damages merely, and are silent as to any restitution,) viz., a judgment to recover the term, and a writ of possession thereupon. This method seems to have been settled as early as the reign of Edward IV. though it hath been said to have first begun under Henry VII. because it probably was then first applied to its present principal use, that of trying the title of the land. Bro. Abr. Fitz. N. B. 220.
The better to apprehend the contrivance, whereby this end is effected, it is to be recollected that the remedy by ejectment is, in its original, an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offence, called in our law *maintenance*, to convey a title to another, when the grantor is not in possession of the land; and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessee from the legal guilt of maintenance. 1 Ch. Rep. An. 39.

When therefore a person, who hath a right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises, and being so in the possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee; and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant or he who had the previous possession, enters thereon afresh and ousts him; or till some other person (either by accident or by agreement beforehand) comes upon the land, and turns him out, or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant or his *casual ejector*, whichever it was that ousted him, to recover back his term and damages. But where this action is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without an opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession, (if any there be,) and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court, viz. title, lease, entry, and _ouster_.

First, he must show a good *title* in his lessor, which brings the matter of right entirely before the court; then, that the lessor, being seized or possessed by virtue of such title, did make him the *lease* for the present term; thirdly, that he, the lessee, or plaintiff, did _enter_ or take possession in consequence of such lease; and then, lastly, that the defendant _ousted_, or ejected him. Whereupon he shall have judgment to recover his term and damages; and shall, in consequence, have a *writ of possession*, which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the court, in order to show the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, (save only as to the notice to the tenant,) whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But, as much
trouble and formality were found to attend the actual making of
the lease, entry, and ouster, a new, and more easy method of try-
ing titles by writ of ejectment, where there is any actual tenant or
occupier of the premises in dispute, was invented by the Lord

This new method entirely depends upon a string of legal fic-
tions; no actual lease is made, no actual entry by the plaintiff, no
actual ouster by the defendant, but all are merely ideal, for the
sole purpose of trying the title. To this end, in the proceedings,
a lease for a term of years is stated to have been made, by him who
claims title, to the plaintiff who brings the action; as by John
Rogers to Richard Smith, which plaintiff ought to be some real
person, and not merely an ideal fictitious one, who hath no exist-
ence, as is frequently, though unwarrantably, practised. 5 Mod.
309. It is also stated that Smith the lessee entered; and that the
defendant William Stiles, who is called the casual ejector, ousted
him; for which ouster he brings this action. As soon as this
action is brought, and the complaint fully stated in the declara-
tion, Stiles, the casual ejector, or defendant, sends a written no-
tice to the tenant in possession of the land, e. g. George Saunders,
informing him of the action brought by Smith, and transmitting
him a copy of the declaration; withal assuring him that he, Stiles,
the defendant, has no title at all to the premises, and shall make
no defence; and therefore advising the tenant to appear in
court and defend his own title; otherwise he, the casual ejector,
will suffer judgment to be had against him, and thereby the
actual tenant, Saunders, will inevitably be turned out of posses-
sion. On receipt of this caution, if the tenant in possession does
not, within a limited time, apply to the court to be admitted a
defendant in the stead of Stiles, he is supposed to have no right
at all; and, upon judgment being had against Stiles, the casual
ejector, Saunders, the real tenant, will be turned out of posses-
sion by the sheriff.

But if the tenant in possession applies to be made a de-
defendant, it is allowed him upon this condition; that he enter into
a rule of court to confess, at the trial of the cause, three of the
four requisites for the maintenance of the plaintiff’s action, viz. the
lease of Rogers the lessor, the entry of Smith the plaintiff, and his
ouster by Saunders himself, now made the defendant, instead of
Stiles; which requisites being wholly fictitious, should the de-
defendant put the plaintiff to prove them, he must of course be
nonsuited for want of evidence; but by such stipulated confession of
lease, entry, and ouster, the trial will now stand upon the merits
of the title only.

This done, the declaration is altered by inserting the name of
George Saunders (the tenant) instead of William Stiles; and the
cause goes down to trial under the name of Smith, (the plaintiff),
on the demise of Rogers, (the lessor,) against Saunders the now de-
defendant. And herein the lessor of the plaintiff is bound to make
cut a clear title, otherwise his fictitious lessee cannot obtain judg-
ment to have possession of the land for the term supposed to be
granted. But if the lessor makes out his title in a satisfactory
manner, then judgment and a writ of possession shall go for
Smith, the nominal plaintiff, who, by this trial, has proved the right
of Rogers, his supposed lessor.
EJECTMENT.

Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by stat. 11 Geo. II. c. 19. on pain of forfeiting three years' rent, to give notice to their landlords when they are served with any declaration in ejectment: and any landlord may, by leave of the court, be made a codefendant to the action, in case the tenant himself appears to it, or, if he makes default, though judgment must be then signed against the casual ejector, yet execution shall be stayed, in case the landlord applies to be made a defendant, and enters into the common rule; a right which, indeed, the landlord had long before the provision of the statute: (Smy. Pract. Reg. 108. 111. 265. 7 Mod. 70. Salt. 237. Burr. 1301.) in like manner as (previous to the statute of Westm. 2. c. 3.) if, in a real action, the tenant of the freehold made default, the remainder-man or reversioner had a right to come in and defend the possession, lest, if judgment were had against the tenant, the estate of those behind should be turned to a naked right. Bract. lib. 5. c. 10. § 14.

A tenant to a mortgagee, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of the stat. 11 Geo. II. 1 Term Ref. 647.

Ejectment may be brought by a mortgagee, without giving notice to quit, against one who was let into possession, as tenant from year to year, by the mortgagor, after the mortgage made to the original mortgagee, but before the assignment of it to the lessor. 3 East's Ref. 449.

In ejectment for a chapel, the parson can only defend for a right to enter and perform divine service. Stra. 914. Notwithstanding 1 Salt. 250. no man is to be admitted tenant or defendant in ejectment by the common rule, unless he hath been in possession, or received rent, and not a mere stranger. Combs. 309.

He who claims title shall be joined as a defendant, though the plaintiff opposes it. 1 Salt. 256. And, therefore, even the wife of the lessor. 1 Salt. 257.

The court permitted an heir, who had never been in possession, to come in and defend the ejectment. The father, under whom he claimed, died just after having first obtained a similar rule. 4 Term Ref. 122. So a mortgagee. Comberb. 399. As to a cestui que trust, see 3 Term Ref. 763. 4 Term Ref. 122.

But if the new defendants, whether landlord or tenant, or both, after entering into the common rule, fail to appear at the trial, and to confess lease, entry, and ouster, the plaintiff Smith must indeed be there nonsuited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector, Stiles; for the condition on which Saunders (the tenant) or his landlord was admitted a defendant, is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out the tenant Saunders, and delivered possession to Smith the plaintiff. The same process, therefore, as would have been had, provided no conditional rule had ever been made, must now be pursued as soon as the condition is broken.
The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) merely nominal, as 1s. In order, therefore, to complete the remedy, when the possession has been long detained from him that had the right to it, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession: whether he be made party to the ejectment, or suffers judgment to go by default. In this case the judgment in ejectment is conclusive evidence against the defendant, for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff; but if the plaintiff sues for any antecedent profits, the defendant may make a new defence.

4 Burr. 668.

Such is the modern way of obliquely bringing in question the title to lands and tenements in order to to try it in this collateral manner; a method which is now universally adopted in almost every case. It is founded on the same principles as the ancient writs of assise; being calculated to try the more possessory title to an estate; and hath succeeded to those real actions, as being infinitely more convenient for attaining the ends of justice; because the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud and chicane, and eviscerate the very truth of the title. The writ of ejectment and its nominal parties (as was resolved by all the judges) are judicially to be considered as the fictitious form of an action, really brought by the lessor of the plaintiff against the tenant in possession; invented, under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side. 4 Burr. 668. See also 3 Burr. 1294. 1296.

But a writ of ejectment is not an adequate means to try the title of all estates, for on those things, whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditaments. Brownt. 129. Cro. Car. 492. Str. 54. Except for tithes in the hands of lay appropriators, by the express purview of stat. 33 Hen. VIII. c. 7 which doctrine hath since been extended by analogy to tithes in the hands of the clergy. Cro. Car. 301. 2 Ld. Raym. 789. Nor will it lie in such cases where the entry of him that hath right is taken away by descent, discontinuance, twenty years' dispossessions, or otherwise.

More particularly, for what things ejectment will lie. Ejectment ought to be brought for a thing that is certain; and if it be of a manor, the manor of A, with the appurtenances; if of a rectory, the rectory of B &c. And so many messuages, cottages, acres of arable land, meadow, &c. with the appurtenances, in the parish of, &c. For land must be distinguished, how much of one sort, and how much of another, &c. Cro. Eliz. 339. 3 Leon. 13. Ejectment lies of a church, as of a house called the parish church of, &c.
And a church is a messuage, by which name it may be recovered: and the declaration is to be served on the parson who performs divine service. 11 Rep. 25. 1 Sleth. 256.

A rector may recover in ejectment against his lessee, on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the 13 Eliz. c. 20, and the lease to the defendant, describing him as doctor in divinity, produced by him at the trial in support of his title, is prima facie, evidence of his being such as he is therein described to be, so as to avoid the lease under stat. 21 Hen. VIII. c. 13. § 3. 2 East's Rep. 467.

It lies de uno messuagio sive burgagio; but not de uno messuagio sive tenemento, unless it have a vocat' A. &c. to make it good, because of the uncertainty of the word tenement. 1 Sid. 295. But for a messuage and tenement hath been allowed. 1 Term Rep. 11. So indeed for a messuage or tenement. 3 Wils. 22. 3 Mod. 328. 1 Sid. 295. But see contra, 1 East's Rep. 441. It will lie for a moiety, or third part of a manor or messuage, &c. And for a chamber or room of a house well set forth. 11 Rep. 55. 59. 3 Leon. 210. It lieth de domo, which hath convenient certainty for the sheriff to deliver possession, &c. 2 Cro. Joc. 654. It lies of a cottage or curtilage; of a coal-mine, &c. but not of a common, piscary, &c. 2 Cro. Joc. 150. For underwood it lieth, though a praecipe doth not. 2 Rotl. Rep. 482, 483. But for una clausa or una pecia terra, &c. without certainty of the acres, and their nature, it doth not lieth. 11 Rep. 55. 4 Mod. 1. It lieth of a close, containing three acres of pasture, &c. Also of so many acres of land covered with water; though not de aquae cursu. 2 Cro. Joc. 455. 1 Brown's 242. It lies for a prebendal stall, after collation to it. 1 Wils. 14.

Ejectment lies by the owner of the soil for land which is part of the king's highway, or of an acre of land, described only by the name of land, though there was a wall, and porch, and part of a house built on it. 1 Burr. 133.

In this action the law requires, that the thing demanded be so particularly specified, that the sheriff may certainly know what to give the possession of, if the plaintiff should recover; for the judgment is in order to execution, and the judgment would be vain, if execution could not be had of the thing specifically demanded; but in this action the judges did not confine themselves to those rules which govern the praecipe, but allowed some things to be recovered in this action, which could not be demanded in a praecipe; because, since the establishment of that real action, many things have been added and improved by art, and acquired new appellations, that are perfectly understood now by the law, which are not found in the ancient law-books; and as men began to contract by new names, which were not known in the old law, so it was reasonable to suffer the remedy to follow the nature of such contracts. See 2 Ld. Rym. 1470. 2 Str. 908. 1 Burr. 629. And, in general, ejectment does not lie without showing the quantity and quality of the land, and how many acres of arable, meadow, and pasture, &c. 11 Ca. 55. 1 Sleth. 234. 4 Mod. 97.

An ejectment is a possessory remedy, and only competent where the lessee of the plaintiff may enter; therefore it is always necessary for the plaintiff to show that his lessee had a right to enter.
EJECTMENT.

by proving a possession within twenty years, or accounting for the

want of it, under some exceptions allowed by the statute; twenty

years' adverse possession is a positive title to the defendant; it is not a

bar to the action or remedy for the plaintiff only, but takes away

his right of possession. 1 Burr. 119. Every plaintiff must show

a right of possession as well as of property, and therefore the de-

defendant needs not plead the statute, as in the case of actions. Ib.

A judgment in ejectment is the recovery of the possession, (not

of the seisin or freehold,) without prejudice to the right, as it may

afterwards appear between the parties. He who enters under it

in truth and substance, can only be possessed according to right,

prout lex postulat. If the lessor have a freehold, he is in as a

freeholder; if he has a chattel interest, he is in as a termor; and

in respect of the freehold, his possession enures according to right.

If he has no title, he is in as a trespasser; and, without any re-

entry by the true owner, is liable to account for the profits. 1

Burr. 114.

This action of ejectment is rendered a very easy and expeditious

remedy to landlords whose tenants are in arrear, by stat. 4 Geo. II.

c. 28, which enacts, that every landlord who hath by his lease a

right of re-entry in case of non-payment of rent, when half a year's

rent is due, and no sufficient distress is to be had, may serve a

declaration in ejectment on his tenant, or fix the same upon some

notorious part of the premises, which will be valid, without any

formal re-entry or previous demand of rent. And a recovery in

such ejectment shall be final and conclusive, both in law and equi-

ty, unless the rent and all costs be paid or tendered within six ca-

lendar months afterwards.

The true construction upon this act is, to take off the landlord

the inconvenience of his continuing always liable to an uncertainty

of possession; (from its remaining in the power of the tenant to of-

fer him a compensation at any time, in order to found an application

for relief in equity;) and to limit and to confine the tenant to six

calendar months after execution granted, for his doing this; or

else that the landlord shall from thenceforth hold the demised

premises discharged from the lease. 1 Burr. 619. As to the

provision of stat. 11 Geo. II. c. 29. § 16. in cases of tenants at

rack-rent being one year in arrear, and deserted the premises, see

this Dict. tit. Rent. Two justices of peace may, in this case, put

the landlord in possession.

Where an ejectment is brought against a tenant, for the purpose

of turning him out of his farm, &c. and the tenant actually holds

the premises of the lessor of the plaintiff, it is sometimes neces-

sary to give him notice to quit possession, in order to maintain an

ejectment. Here we may observe, that demises, where no certain

term is mentioned, are held to be tenancies from year to year,

which neither party can determine without reasonable notice to

the other. This notice is, in most counties, six months; and it

must in all such cases expire at that part of the year when the

tenancy commenced; and therefore it hath been held, that half a

year's notice to quit possession must be given to such tenant; be-

fore the end of which time the landlord cannot maintain an eject-

ment, unless the tenant has attorned to some other person, or done

some act disclaiming to hold as tenant; in which case no notice is
necessary. And the same law will apply to the executor of such a tenant. 3 Wils. 25. See 1 Term Rep. 160. 4 Term Rep. 361.

A landlord gave notice to quit different parts of a farm at different times, which the tenant neglected to do in part; in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired, the landlord, fearing that the witness, by whom he was to prove the notice, would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment: held, the second notice was no waiver of the first. 2 East’s Refs. 237.

Where a defendant in ejectment held, as to the arable lands, from Candemason, and as to the rest of the farm from May-day, the rent being payable at Michaelmas and Lady-day, and notice to quit was given six months before May-day, and not six months before Candemason; the plaintiff was nonsuited. See 2 East’s Refs. 364.

Under an agreement by a tenant of a farm "to enter on the tillage-land at Candelmas, and on the house and all other the premises at Lady-day following, and that when he left the farm he should quit the same according to the times of entry as aforesaid," and the rent was reserved half-yearly at Michaelmas and Lady-day: held that notice to quit, delivered half a year before Lady-day, but less than a half year before Candemason, was good; the taking being, in substance, from Lady-day, with a privilege for the incoming tenant to enter on the arable land at Candemason, for the sake of ploughing, &c. 6 East’s Ref. 120.

After the expiration of a lease for a certain term, the tenant continuing in possession is deemed a trespasser; and therefore an ejectment, which is an action of trespass, may be brought without any notice to quit.

But in ejectment by a landlord against a tenant whose lease is expired, the latter is not barred from showing that his landlord’s title is expired. 4 Term Rep. K. B. 682.

Points of practice relating to ejectments. Where there is a tenant in possession, in order to proceed against him, prepare a declaration, the copy of which, upon stamp, you serve the tenant with; if there be more than one tenant, each must be served with a copy; but if the man is not at home, his wife will do; (provided she be served on the premises, and so sworn to;) this is necessary both in town and country causes. At the time of service, in all cases, it is requisite to read over or explain the notice at the foot of the declaration to the person served. Impey’s K. B. which see at length.

The tenant’s son, daughter, or servant, he being out of the way, must not be served, unless it appear to the court that such declaration and notice came to his hands, in which case it has been held a good delivery; but if the tenant purposely keep out of the way to avoid being served, the court, on affidavit, will grant a rule to show cause why that should not be deemed good service.

In case the servant, &c. be served, and motion be made that it be deemed good service, the tenant must swear that the declaration never came to his hands before the time of showing cause, or the court will make the rule absolute. Trin. 30 Geo. III. In this case to ground such a motion you must show endeavours to serve him at several times, &c.
The declaration must be served before the essoin-day of every term, either in town or country, and the notice must be made to appear in the next term after delivery; but the delivery on a Sunday, or on the essoin-day of that term wherein the defendant is to appear, will not do.

If the premises be in London or Middlesex, the notice must be made to appear the first day of the next term after service, for if made generally, the tenant in possession has the whole term to appear in; but if the tenements lie in any other county, the notice must be to appear as of the next term generally.

Ejectment must be brought in the county where the lands lie; and the declaration must set forth the particular parish; and the day of the demise must be laid after the title accrues, otherwise the plaintiff will be nonsuited; and the plaintiff must lay the commencement of his supposed lease, to have been precedent to the ejectment by the defendant. 1 Sid. 8; 2 New Abr. 171.

If the title of the lesser of the plaintiff accrue in Easter vacation, yet the plaintiff may deliver his ejectment as of Easter term, and shall recover thereon, because he makes up his issue, or takes judgment as of the next term; otherwise the act of the law, which supposes the bill filed as of the first day of Easter term, before a title accrued to the plaintiff, would be an act of injury to him, and delay his right; for a man ejected out of a lease made in term time, could not complain till term was over. 2 Vent. 174.

It must be brought within twenty years, by stat. 21 Jac. l. c. 16. Sid. 432. See ante, and tit. Limitation of Actions.

It was formerly held that a declaration in ejectment could not be altered or amended after once delivered, in the most trivial matters; but it has since been held, that an ejectment is a mere fictitious action, and the demise mere matter of form, nor does it exist, and on application, the demise was ordered to be amended; but this was to save the plaintiff from being barred by a fine, if he had been obliged to bring a new ejectment. 4 Burr. 2447. Therefore, as the demise may be altered, there can be no doubt that other parts less material may also be amended; the action being invented under the control of the court, for the advancement of justice, and merely to try the right in question. 1 Burr. 665. The term may be amended without consent from five to ten years. Str. 1272. 1511. A verdict cures a defect in setting out the title, though it cannot cure a defective title. 2 Burr. 1159. See tit. Amendment.

It is necessary to prove the defendant or his tenant in possession of the premises: for the rule is, that the landlord shall defend for the premises only whereof his tenants are in possession; and the party does not admit himself to be landlord of any premises which the plaintiff may make title to, but of such only as were in possession of those tenants. 1 Wils. 220.

A new trial may, upon proper grounds, be granted in ejectment, as well as in other cases. 4 Burr. 2524.

In real actions, where the freehold is recovered, the demandant has execution, by the writ of habere facias seviam; in ejectment, therefore, it is but just, that a similar remedy shall be permitted to the plaintiff; who, as he now has judgment to recover the possession of the land, may put the sentence of the law in execution by
EJECTMENT.

virtue of a writ of habere facias possessionem, directing the sheriff to give actual possession to the plaintiff, of the land recovered.

This writ may be sued out though the lessor of the plaintiff be dead, if tested the last day of the preceding term. 4 Burr. 1970. The legal relation to the day of the testee is proper to be supported in maintenance of a writ of possession on a judgment in ejectment. Ibid.

In ejectment, where there are divers defendants, and the freeholds are several, no defendant may defend for more than is in his own possession; and the plaintiff may take judgment against his ejector for what remains. 1 Vent. 355. 2 Keb. 324. 531.

If there be two defendants in ejectment, and one of them appears and confesses lease, entry, and ouster, but the other does not appear, in that case the plaintiff may enter a non pros, or retracted, against him, and go to trial, and have judgment against the other defendant. 1 Ld. Raym. 717, 718. Also if an ejectment be brought against two persons, and after issue joined, one dies, and a venire is awarded as to the two defendants; and a verdict against two; here, upon suggestion of the death of one of them upon the roll, judgment shall be given for the plaintiff against the other for the whole: for it is said this action is grounded upon torts, which are several in their nature, and one may be found guilty and the other acquitted. Ibid.

Where one brings ejectment of land in two parishes, and the whole lies in one, he shall recover: also if a person brings ejectment of one acre in B. and part of it lies in A. he shall recover for such part as lies in B. And if one having title to a part only of lands, bringeth an ejectment for the whole, he shall recover his part of the lands. Plowd. 429. Cro. Car. 13.

A plaintiff shall recover only according to the right which he hath at the time of bringing his action: and one who hath title to the land in question, may on motion be made a defendant in the action with the tenant in possession, to defend his title. 1 Nels. Abr. 694. 1 Ill. 497. &c. As the possession of the land is primarily in question, and to be recovered, that concerns the tenant; and the title of the land, which is tried collaterally, that concerns some other, who may be admitted to be a defendant with the tenant; but none other is to be admitted a defendant, but he that hath been in possession, or receives the rents, &c.

If the plaintiff can prove his title accrued before the time of the demise, and that the defendant hath been longer in possession, he shall recover antecedent profits; but in such case the defendant will be at liberty to controvert his title. Bull. N. P. 83.

Where an actual entry is necessary, the demise must be laid after it. 7 Term Rep. K. B. 433. An actual entry is necessary to avoid a fine, and the party so avoiding it cannot lay his demise in an ejectment, to recover the mesne profits that accrued before such entry. 7 Term Rep. K. B. 727. See also 1 East's Rep. 568.

As the plaintiff in ejectment is a mere nominal person, and a trustee for the lessor; if he release the action, the court may set aside the release, and he shall be committed for a contempt; so likewise if he release an action brought in his name for the mesne profits. 1 Salk. 260. 6 Simm. 247. If a man is made plaintiff in ejectment without his knowledge, and the defendant appearing, the
plaintiff thereupon becomes nonsuit, after which execution is sued out against him; if it appears by his oath that he was made plaintiff without his knowledge or order, he shall be discharged. 34 Car. B. R. 5 Ann. 1 Litt. 500.

If there be a verdict and judgment against the plaintiff, he may bring another action of trespass and ejectment for the land, it being only to recover the possession, &c. wherein judgment is not final; and it is not like a writ of right, &c. where the title alone is tried. Wood's Inst. 547. Trin. 23 Car. B. R.

The reason of an ejectment being never final, is not laid down in the general books on this subject, but in the notes to Eeonomus, vol. 4. p. 189. it is thus ingeniously stated. The reason why it is not or cannot be final seems to be this. That it is impossible from the structure of the record in this action, to plead a former, in bar of another, ejectment brought. Because, 1. The plaintiff and defendant are nominal, and exist in most cases on record only; and consequently may be changed in a new action. But the identity both of the plaintiff and defendant must be averred in pleading a former action in bar. 2. The term demised may be laid many different ways. An ejectment, however, though in its nature not final at law, is capable of being made so in equity; and the court of chancery will, on proper grounds, grant a perpetual injunction, and not permit the possession of lands to be disturbed by a vain incessant litigation of the same question. See 2 Eq. Abr. 171. c. 1. 243. c. 11. 222. c. 1. Parl. Cases, (8vo.) tit. Injunction, ca. 1. 3. 2 Sre. 404.

Form of the Declaration in Ejectment, by original, against the casual ejector, who gives notice thereupon to the tenant in possession.

Michaelmas, the 29th of King George the Third.

BERKS.

WILLIAM STILES, late of Newbury, in the said county, to wit. 

gentleman, was attached, to answer Richard Smith, of a plea, wherefor with force and arms he entered into one message, with the appurtenances, in Sutton, in the county aforesaid, which John Rogers, esq. demised to the said Richard Smith, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the lord the king, &c. And whereupon the said Richard, by Robert Martin, his attorney, complains, that whereas the said John Rogers, on the 1st day of October, in the twenty-ninth year of the reign of the lord the king that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the feast of Saint Michael the archangel then last past, to the end and term of five years from thence next following, and fully to be complete and ended; by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was possessed thereof; and the said Richard being so possessed thereof, the said William, afterwards, that is to say, on the said first day of Octo-
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... in the said 29th year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the affurteinances, in the possession of the said Richard, which the said John Rogers demised to the said Richard in form aforesaid, for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said lord the king. Whereby the said Richard saith, that he is injured and damaged to the value of 20l. And thereupon he brings suit, &c.

Mr. George Saunders,

I am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary term, in his majesty's court of king's bench, wheresoever he shall then be in England, by some attorney of that court, and then and there by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend,

William Stiles.

The form of the declaration by bill does not differ very materially; and the above is inserted by way of elucidation, chiefly to such tenants, &c. as may peruse this article.

For further matter relating to ejectment, see Bull. N. P. and Gilbert's Ejectments by Rumington.

EJECTUM, ejectus maris, quad à mari ejicitur: Jet, jetsom, wreck, &c. See tit. Wreck.

EIGNE, Fr. aisné.] Eldest or first born; as bastard eigne, and mulier puisne are words used in our law for the elder a bastard, and the younger lawful born. See tit. Bastard.

EINECIA, from the Fr. aisné, i.e. primogenitus.] Eldership. Stat. of Ireland, 14 Hen. III. See Enecey.

EIRE, or EYRE, Fr. eire, viz. ier, as a grand eire, that is, magnis itineribus.] Is the court of justices itinerant; and justices in eyre are those whom Bracten in many places calls justiciarios itinerantes. These justices, in ancient time, were sent with a general commission into divers counties to hear such causes as were termed pleas of the crown; and this was done for the ease of the people, who must else have been hurried to the king's bench, if the cause were too high for the county court: it is said they were sent but once in every seven years. Bract. lib. 3. c. 11. Horn's Mirror, lib. 2. The eyre of the forest is the justice-sect; which, by an ancient custom, was held every three years by the justices of the forest, journeying up and down for that purpose. Bract. lib. 3. tract 2. c. 1 & 2. Brit. c. 2. Compl. Juri. 156. Manw. par. 1. p. 121. See tit. Justices in Eyre.
ELECTION, electio.] In law, is when a man is left to his own free will, to take or do one thing or another, which he pleases. And if it be given of several things, he who is the first agent, and ought to do the first act, shall have the election: as if a person make a lease, rendering rent, or a garment, &c. the lessee shall have the election, as being the first agent, by the payment of the one, or delivery of the other. Co. Litt. 144. And if A. covenant to pay B. a pound of pepper or sugar, before Easter; it is at the election of A. at all times before Easter, which of them he will pay; but if he pays it not before the said feast, then afterwards it is at the election of B. to demand, and have which he pleaseth. Dyer, 18. 5 Rep. 59 11 Rep. 51.

If I give to you one of my horses in my stable, there you shall have the election; for you shall be the first agent, by taking or seizure of one of them. Co. Litt. 145. If things granted are annual, and to have continuance, the election (where the law gives it him) remains to the grantor, as well after the day as before; but it is otherwise when to be performed at once. Ibid. When nothing passes to the feoffee or grantee before election, to have the one thing or the other, the election ought to be made in the life of the parties; and the heir or executor cannot make the election: but where an estate or interest passes immediately to the feoffee, donee, &c. there election may be made by them, or their heirs or executors. 2 Rep. 35, 37. And when one and the same thing passeth to the donee or grantee, and such donee or grantee hath election in what manner he will take it, there the interest passeth immediately, and the party, his heirs, &c. may make election when they will. Co. Litt. 145. 2 Danv. Abr. 761.

Where the election creates the interest, nothing passes till election; and if no election can be made, no interest will arise. Hob. 174. If the election is given to several persons, there the first election made by any of the persons shall stand: as if a man leases two acres to A. for life, remainder of one acre to B. and of the other acre to C. Now B. or C. may elect which of the acres he will have, and the first election by one binds the other. Co. Litt. 145. 2 Rep. 35. If a man leases two acres for life, the remainder of one in fee to the same person; and after licenses the lessee to cut trees in one acre, this is an election that he shall have the fee in the other acre. 2 Danv. 762. A real election concerning lands is descendible; and election of a tenant in tail may prejudice his issue. He in remainder may make an election after the death of tenant for life; but if the tenant for life do make election, the remainder-man is concluded. Moor, Ca. 247. 332.

A person grants a manor, except one close called N. and there are two closes called by that name, one containing nine acres, and the other but three acres, the grantee shall not, in this case, choose which of the said closes he will have; but the grantor shall have election which close shall pass. 1 Leon. 268. But if one grants an acre of land out of a waste or common, and doth not say in what part, or how to be bounded, the grantee may make his election where he will. 1 Leon. 30. If a man hath three daughters, and he covenants with another that he shall have one of them to dispose of in marriage; it is at the covenantor's election which of his daughters the covenantee shall have, and, after request, she is
to be delivered to him. *Moor*, 72. 2 Danv. 762. Where there
are three coparceners of lands, upon partition the eldest sister shall
have the *election*; though if she herself make the partition, she
losest it, and shall take last of all. *Co. Litt.* 166. See tit. *E-
nection.*

In consideration that a person had sold another certain goods,
he promised to deliver him the value in such pipes of wine as he
should choose; the plaintiff must make his election before he
brings his action. *Sty.* 49. An *election* which of two things
shall be done, ought not to be made merely by bringing an ac-
tion; but before, that the defendant may know which he is to do,
and it is said he is not bound to tender either before the plaintiff
hath made his choice which will be accepted. 1 *Mod.* 217. 1 *Nels.
Abr.* 697.

A condition of a bond is, that the obligor shall pay 30l. or twen-
ty kine, at the obligee's *election*, within such a time; the obligee,
at his peril, is to make his *election* within the time limited. 1 *Leon.
69.* Though in debt upon bond to pay 10l. on such a day, or four
cows, at the then *election* of the obligee, it was adjudged, that it
was not enough for the defendant to plead that he was always
ready, &c. if the obligee had made his *election*; for he ought to
tender both at the day, by reason the word *then* relates to the
day of payment. *Moor*, 246. 1 *Nels.* 694, 695.

If a man hath an *election* to do one of two things, and he can-
not by any default of a stranger, or of himself, or the obligee, or
by the act of God, do the one; he must at his peril do the other.
1 *Litt. Abr.* 505.

Where the law allows a man two actions to recover his right, it
is at his *election* to bring which he pleaseth; and when a man's act
may work two ways, both arising out of his interest, he hath *elec-
Action of trespass upon the case, or action of trespass *vi et armis,
may be brought against one that rescues a prisoner, at the *elec-
tions* of the party damned by the rescous. And an action on the case,
or an assise, lies against him that surcharges a common, at the
*election* of him that is injured thereby. 1 *Litt.* 504, 505. Also for
a rent-charge out of lands, there may be a *writ of annuity or dis-
tress*, at the *election* of the grantee; but after the death of the
grantor, if the heir be not charged, the *election* to bring annuity

A man was indicted of felony for entering a house, and taking
away money, and found guilty, and burnt in the hand; after which
the person who lost the money brought an action of trespass
against the other for breaking his house, and taking away his mo-
ney; and it was held that the action would lie; for though it was
at his *election* at first, either to prefer an indictment or bring an
action, yet by the indictment he had made no *election*, because that
was not the prosecution of the party, but of the crown. *Sty.
347.*

If a bargain and sale be made of lands, which is enrolled, and
at the same time a bargainor levies a fine thereof to the bargainee,
hath his *election* to take by one or the other. 4 *Rec.* 72. A wife
hath her *election* which to take, of a jointure made after marriage,
or her dower, on the death of the husband, and not before. *Dyer,
Vol. II.* 3 A
358. When a lessor hath election to charge the lessee, or his assignee, for rent; if he accepts the rent of the assignee, he hath determined his election. 3 Rep. 24.

If a person hath election to pay or perform one of two things at a day, and he do neither of them at that day, his election is gone: and where a grant is made of two acres of land, the one for life, the other in fee, or in tail, and before any election the feoffee makes a feoffment of both; in this case the election will be gone, and the feoffor may enter upon which he will for the forfeiture. 2 Rep. 37. If money on a mortgage be to be paid to a man, his heirs or executors, the mortgagor hath election to pay it to either: and if in a feoffment it be to pay to the feoffee, his heirs or assigns, and he enfeoff another, the feoffor may pay the money to the first or second feoffee, &c. Co. Litt. 210.

In some cases, where one hath cause of suit, he may sue one person or another at his election; for there is an election of persons, as well as of things. Dyer, 204, 207. A man by deed binds himself and his heirs to pay money, and dies; the obligee may choose to sue the heir, or the executors, although both of them have assets. Poph. 151. One may have election, when he hath recovered a debt, to have his execution by elegit, fieri facias, or capias ad satisfaciendum; but where he takes an elegit, and hath no fruit of it, he may resort to another writ, though the election be entered on record. Hub. 37. Dyer, 60, 369.

There is no election against the king in his grants, &c. 1 Leon. 30. And an act becoming void, will determine an election. Hub. 152. As to election with respect to one action or another, see 1 Com. Dig. tit. Action. And this Dict. tit. Condition, Agreement.

Election of a Clerk of Statutes-Merchant. A writ that lies for the choice of a clerk assigned to take bonds called statutes-merchant; and is granted out of the chancery, upon suggestion that the clerk formerly assigned is gone to dwell at another place, or is under some impediment to attend the duty of his office, or hath not lands sufficient to answer his transgressions, if he should act amiss; &c. Fitz. N. B. 164.

Election of Ecclesiastical Persons. There is to be a free election for the dignities of the church. Stat. 9 Edw. II. c. 14. And none shall disturb any person from making free election, on pain of great forfeiture. If any persons that have a voice in elections, take any reward for an election in any church, college, school, &c. the election shall be void; and if any of such societies resign their places to others for reward, they incur a forfeiture of double the sum; and the party giving it, and the party taking it, is incapable of such place. Stat. 31 Eliz. c. 6. See further, tit. Bishops, Deans.


Election of a Verderor of the Forest, electione viridario-rum foresar.] A writ which lies for the choice of a verderor, where any of the verderors of the forest are dead, or removed from their offices, &c. It is directed to the sheriff; and, as appears by the ancient writs of this kind, the verderor is to be elected by the freeholders of the county, in the same manner as coroners. New Nat. Brev. 366.
ELEEMOSYNA, alms; dare in puram et perpetuum eleemosynam, to give in pure and perpetual alms, or frankalmoigne; as lands were commonly given in ancient times to religious uses. Cowel. See tit. Frankalmoigne, Tenure.

ELEEMOSYNE, The possessions belonging to the churches. Blount.

ELEEMOSYNA REGIS, or eleemosyna aratris. A penny which King Ethelred ordered to be paid for every plough in England, towards the support of the poor: it was called eleemosyna regis, because it was first appointed by the king. Leg. Ethelred, cap. 1.

ELEEMOSYNARIA, The place in a religious house, where the common alms were reposited, and thence by the almoner distributed to the poor.

ELEEMOSYNARIUS, The almoner or peculiar officer who received the eleemosynary rents and gifts, and in due method distributed them to pious and charitable uses. There was such a chief officer in all the religious houses: and the greatest of our English bishops had anciently their almoners, as now the king hath. Lindwood's Provincial, lib. 1, tit. 12. See tit. Almoner.

ELEEMOSYNARY CORPORATIONS, Corporate bodies appointed over hospitals, &c. constituted for the perpetual distribution of free alms, or bounty of the founder of them. See tit. Corporation.

ELEGIT. From the words in the writ; elegit sibi liberari, because the plaintiff hath chosen this writ of execution. See 3 Comm. 418.] A writ of execution founded on the stat. West. 2. (13 Edw. 1.) c. 18. that lies for him who hath recovered debt or damages, or upon a recognisance in any court against one not able in his goods to satisfy the same, directed to the sheriff, commanding him to make delivery of a moiety of the party's land, and all his goods, beasts of the plough excepted. And the creditor shall hold the said moiety of the land so delivered unto him, until his whole debt and damages are paid and satisfied; and during that term he is tenant by elegit. Reg. Orig. 299. Co. Litt. 289.

Upon an elegit, the sheriff is to deliver one half of all houses, lands, meadows and pastures, rents, reversions, and hereditaments wherein the defendant had any sole estate in fee, or for life, into whose hands soever the same do afterwards come; but not of a right only to land, an annuity, copyhold lands, &c. Dyer, 306. 7 Rep. 49. Plowd. 234. And by it, the plaintiff, &c. elects omnia bona et catala of the defendant, fierae boves et afros de caruca sua; and also a moiety of all the lands which the defendant had at the time of the judgment recovered; but it ought to be sued within a year and a day after the judgment. Fitz. N. B. 267.

But though, by this statute, the lands of the debtor are made liable, as well as his personal estate, yet if the creditor takes an elegit, and it appears to the sheriff that there are goods and chattels sufficient of the debtor's to satisfy the debt, he ought not to extend the lands. 2 Inst. 395. But an elegit executed upon goods only, is not a fieri facias, for a fieri facias is executed by sale by the sheriff; but the elegit by the appraisement of the goods by a jury, and delivery to the party. 1 Sid. 184. 1 Lev. 92. 1 Keb. 102. 261. 465. 556. 692.

Upon this writ the sheriff is to empannel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to ap-
praise the same, and also to inquire as to his lands and tenements; and upon such inquisition the sheriff is to deliver all the goods and chattels, (except the beasts of the plough,) and a moiety of the lands, to the party, and must return his writ, in order to record such inquisition in that court out of which the elegit issued: and when the jury have found the seizin and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety thereof to the plaintiff by metes and bounds. 4 Cro. Cur. 319.

All writs of execution may be good, though not returned, except an elegit; but that must be returned, because an inquisition is to be taken upon it, and that the court may judge of the sufficiency thereof. 4 Rep. 65. 74. It has been ruled, that if more than a moiety of the lands is delivered on an elegit by the sheriff, the same is void for the whole. Std. 91. 2 Salk. 583. And the sheriff cannot sell any thing but what is found in the inquisition; and therefore if he sell a term for years, &c. misrecited in the inquisition, as to the commencement thereof, the sale is void. 4 Rep. 74.

In debt upon bond, the defendant before the trial conveyed his lands to another, &c. but he himself took the profits; notwithstanding this conveyance, a moiety of his lands was extended on an elegit. Dyer, 294. 3 Rep. 78. If two persons have each of them a judgment against one debtor, and he who hath the first judgment brings an elegit, and hath the moiety of the lands delivered to him in execution; and then the other judgment creditor sues out another elegit, he shall have only a moiety of that moiety, which was not extended by the first judgment. Cro. Eliz. 483.

When lands are once taken in execution on an elegit, and the writ is returned and filed, the plaintiff shall have no other execution. 1 L. &c. 92. And if the defendant hath lands in more counties than one, and the plaintiff awards an elegit to one county, and extends the lands upon the elegit, and afterwards files the writ, he cannot, after that, sue out an elegit into the other counties; but he may immediately, after entry of the judgment upon the judgment roll, award as many elegits into as many counties as he thinks fit, and execute all, or any of them, at his pleasure. 1 Litt. Abr. 509. Cro. Soc. 246.

A man had lands in execution upon an elegit, and afterwards moved for a new elegit, upon proof that the defendant had other lands, not known to the creditor at the time when the execution was sued out; and it was adjudged, that if he had accepted of the first by the delivery of the sheriff, he could not afterwards have a new elegit; but when the sheriff returns the writ, he may waive it, and then have a new extent. Cro. Eliz. 310. 1 Nels. Abr. 669. Sed qt.

If the defendant dies in prison, so that there is no execution with satisfaction, the plaintiff shall have an elegit afterwards. 5 Rep. 86. And if all the lands extended on an elegit be evicted by a better title, the plaintiff may take out a new execution. 4 Rep. 66. Where one having land by elegit, is wholly evicted out of it, he may have a further execution, either against the defendant's lands or goods, as he might have had at first; save only, he must bring a scire facias against the defendant, or him that comes in under him; but if the eviction be of part of the land, or for a time only, so that the plaintiff may take his full execution by holding it over,
there he cannot have any new execution, by the stat. 32 Hen. 
VIII. c. 5. 2 Shep. Abr. 115.
Where an elegit is sued upon a judgment, the levying of goods 
thereon, for part only, is no impediment, but the plaintiff may 
bring another elegit pro residuo, and take the lands. 1 Lec. 92.
On a writ returned upon an elegit, there may be brought a capias 
ad satisfaciendum, or fieri facias. 1 Leon. 176. And an elegit may 
be sued after a fieri facias returned nulla bone, or where part is 
levied by it; and after a capias ad satisfaciendum returned non est in-
ventus. Hob. 57.
A person in execution was suffered to escape, and then he died; 
the land which he had at the time of the judgment may be extend-
ed, by elegit, upon a seire facias brought against his heir, as ter-
A man may have an assise of the land which he hath in execution 
by elegit, if he be deforced thereof. Stat. Wescn. 2. c. 18.
And if tenant by elegit alien the land in fee, &c. he who hath right 
shall have against him, and the alienee, an assise of novel disasaim.
Ibid. At a trial at bar in C. B. the court delivered for law, that 
where lands are actually extended, and delivered upon an elegit, 
a fine levied on those lands, and non-claim, will bar the interest of 
the tenant by elegit. 1 Mod. 217.
If tenant by elegit be put out of possession before he hath received 
satisfaction for his debt, by the heir at law, &c. he may bring ac-
tion of trespass, or re-enter and hold over till satisfied: but, after 
satisfaction received, the defendant may enter on the tenant by 
elegit. 4 Rep. 28. 67. Tenants by elegit, statutes-merchant, &c. 
are not punishable for waste, by action of waste: but the party, 
against whom execution is sued, is to have a writ of venire facias 
ad computandum, &c. and there the waste shall be recovered in 
the debt: though it is said there is an old writ of waste in the re-
register, for him in reversion against tenant by elegit, committing 
the waste on lands which he hath in execution. 6 Rep. 57. New 
Nat. Brev. 130. On tenant by elegit's accounting, if the money 
recovered by the plaintiff is levied out of the lands, the defend-
ant shall recover his land; and if more be received by waste, &c. 
he shall have damages. Terms de Ley. See this Dici. tit. Estate, 
Extent, Execution.

ELF-ARROWS. Were flint stones sharpened on each side in 
shape of arrow-heads, made use of in war by the ancient Britons; 
of which several have been found in England, and greater plenty 
in Scotland, where it is said the common people imagine they 
drop from the clouds, or are made by the elves or fairies.

ELISORS, electors.] In cases of challenge to the sheriff and 
cornerers for partiality, &c. the venire to summon a jury shall be 
directed to two clerks of the court, or two persons of the county 
named by the court and sworn. And these two, who are called 
elisors, shall indifferently name or choose the jury; and their 
return is final; no challenge being allowed to their array. Fortesc. 

ELKE, A kind of yew to make bows of. Stat. 32 Hen. VIII. 
chap. 9.

ELOINE, from the Fr. esloiner.] To remove or send a great 
way off: in this sense it is used where it is said that if such as are
EMB

within age be eloped, so that they cannot come to sue personally, their next friend shall be admitted to sue for them.  Stat. 13 Edw. 1. cap. 15.

ELONGATA, Is a return of the sheriff in refelvin, that castle are not to be found, or are removed, so that he cannot make de-

liverance, &c. 2 Litt. Abr. 454. 458.

ELOPEMENT, from the Belg. E'e matrimonium et loopen, cur-

rère; or more probably from the Sax. Gelooran, to depart; the Saxon r being easily perverted from its shape into a p. Blount. Is where a married woman, of her own accord, goes away, and

departs from her husband, and lives with an adulterer. See tit. Adultery, Baron and Feme.

ELY, A royal franchise, or county palatine. See tit. Counties Palatine.

The bishop of Ely has not a palatinate jurisdiction within the isle, though exercising jura regalia there. A writ of fieri facias directed, in the first instance, to the bailiff of the isle of Ely, out

of K. B. is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution. Process issued out of the courts at Westminster into

the isle, goes, in the first instance, to the sheriff of Cambridgeshire, who, thereupon, issues his mandate to the bailiff of the franchise. 3 East's Rep. 128.

EMBARGO, A prohibition upon shipping not to go out of any port, on a war breaking out, &c. See Imbargo.

EMBASSADOR, See Ambassador.

EMBEZZLEMENT, See Servants.

EMBLEMATA, See from the Fr. emblevence de bled, corn sprung,
or put up above ground.] The profits of sown land: but the word

is sometimes used more largely, for any products that arise natu-

rally from the ground: as grass, fruit, &c. In some cases, he who

sowed the corn shall have the emblems; and in others not: a

lessee at will sows the land, he shall have the emblems: though

if the lessee determines the will himself, he shall not have them, but the lessor. 5 Rep. 116. If lessee at will sows the land with

grain, or other thing yielding annual profit, and the lessor enters before severance; yet the lessee shall have it: but where the

lessee plants young fruit-trees, or other trees, or sows the land

with acorns, &c. he shall not have these: and if such tenant, by

good husbandry, make the grass to grow in greater abundance; or

sow the land with hay-seed, by which means it is increased, if the

lessee enters on the lessee, the lessee shall not have it, because

grass is the natural profit of the soil. Co. Litt. 53, 56.

Where tenant for life sows the land, and dies, his executors

shall have the emblems, and not the lessee or him in reversion;

by reason of the uncertainty of the estate. Cro. Eliz. 463. And

if a tenant for life plants hops, and dies before severance, he in re-

version shall not have them, but the executors of tenant for life.

Cro. Car. 515. If tenant for years (if he so long live) sow the

ground, and die before severance, the executor of the lessee shall

have the corn: and where lessee for life leases for years, if the

lessee for years sow the land, and after lessee for life dies before

severance, the executor of lessee for years shall have the emble-

ments. 2 Danv. Abr. 765.
So it is also if a man be tenant for the life of another; and *cestui que vie* (he on whose life the land is held) dies after the corn sown, the tenant *pur auster vie* shall have the *emblements*. The same is also the rule if a life-estate be determined by the act of law. Therefore if a lease be made to husband and wife during coverture, (which gives them a determinable estate for life,) and the husband sows the land, and afterwards they are divorced *à vinculo matrimonii*, the husband shall in this case have the *emblements* for the sentence of divorce is the act of the law. 5 *Ref.* 116. But if an estate for life be determined by the tenant's own act; as by forfeiture for waste committed; or if a tenant, during widowhood, thinks proper to marry; in these and similar cases, as in that of a tenant at will determining his own tenure, the tenant shall not be entitled to take the *emblements*. 1 *Inst.* 55.

If tenant for years sows ground, and before his corn is severed, the term which is certain expires; the lessor or he in reversion shall have the *emblements*; but he must first enter on the lands. 1 *Litt.* *Abr.* 511. A lessee for life or years sows the land, and after surrenders, &c. before severance, the lessor shall have the corn. 2 *Daw* 764. If there be lessee for years, upon condition that if he commit waste, &c. his estate shall cease; if he sows the ground with corn, and after doth waste, the lessor shall have the corn. *Co.* *Litt.* 55. And where a lord enters on his tenant for a forfeiture, he shall have the corn on the ground. 4 *Ref.* 21.

Though if a *feme* copyholder for her widowhood sows the land, and before severance takes husband, so that her estate is determined, the lord shall have the *emblements*; yet if such a *feme* copyholder, *durante viduitate*, leases for one year according to custom, and the lessee sows the land, and afterwards the copyholder takes husband, the lessee shall have the corn. 2 *Daw* 764. If a husband holds lands for life, in right of his wife, and sow the land, and after she dies before severance, he shall have the *emblements*. *Dyer*, 316. 1 *Nels.* *Abr.* 701. And where the wife hath an estate for years, life, or in fee, and the husband sows the land, and dieth, his executors shall have the corn. 1 *Nels.* 702. But if the husband and wife are joint-tenants, though the husband sow the land with corn, and dies before ripe, the wife, and not his executors, shall have the corn, she being the surviving joint-tenant. *Co.* *Litt.* 199.

When a widow is endowed with lands sown, she shall have the *emblements*, and not the heir. 2 *Inst.* 81. And a tenant in dower may dispose of corn sown on the ground; or it may go to her executors, if she die before severance. 2 *Inst.* 80, 81. And by the particular provisions of stat. 28 *Htn.* VIII. c. 11, if a parson sows his glebe, and dies, his executors shall have the corn: and such parson may by will dispose thereof. 1 *Roll.* *Abr.* 655.

If tenant by statute-merchant sows the land, and before severance a casual profit happens, by which he is satisfied, yet he shall have the corn. *Co.* *Litt.* 55. Lands sown are delivered in execution upon an extent the person to whom delivered shall have the corn on the ground. 2 *Leon.* 54. And judgment was given against a person, and then he sowed the land, and brought a writ of error to reverse the judgment, but it was affirmed; and adjudged that the recoveror shall have the corn. 2 *Bulst.* 218.
If a disseisor sows the land, and afterwards cuts the corn, but before it is carried away the disseisee enters, the disseisee shall have the corn. Dyer, 31. 11 Rep. 52. A person seised in fee of land dies, having a daughter, and his wife privyment enseini with a son; the daughter enters and sows the land, and before severance of the corn, the son is born; in this case the daughter shall have the corn, her estate being lawful, and defeated by the act of God; and it is for the public good that the land should be sown. Co. Litt. 55.

A man seised in fee-simple sows land, and then devises the land by will, and dies before severance; the devisee shall have the corn; and not the deviseor's executors. Winch. 52. Cro. Eliz. 61. If a person devises his lands sown, and says nothing of the corn, the corn shall go with the land to the devisee; and when a man seised of lands, in fee or in tail, sows it, and dies without will, it goes to the executor, and not the heir. 10 Edw. IV. 1 b. 21 Hen. VI. 30. a. 37 Hen. VI. 35 b. A devisee for life dies; he in remainder shall have the embrlements with the land. Hob. 132.

Tenant in fee sows the land, and devises it to A. for life, remainder to B. for life, and dies; A. dies before severance, B. in remainder shall have the corn, and not the executor of the first tenant for life. Cro. Eliz. 61. 464. Where there is a right to embrlements, ingress, egress, and regress are allowed by law, to enter, cut, and carry them away, when the estate is determined, &c. 1 Inst. 56.

EMBLERS DE GENTZ, Fr.] A scaling from the people; the word occurs in our old rolls of parliament. Whereas divers murders, emblers de gentz, and robberies are committed, &c. Rot. Parl. 21 Edw. III. n. 62.

EMBRACEOR, Fr. embraseur.] He that when a matter is in trial between party and party, comes to the bar with one of the parties, having received some reward so to do, and speaks in the case; or privately labours the jury, or stands in the court to survey and overlook them, whereby they are awed or influenced, or put in fear or doubt of the matter. Stat. 19 Hen. VII. cap. 13. But lawyers, attorneys, &c. may speak in the case for their clients, and not be embraceors: also the plaintiff may labour the jurors to appear in his own cause; but a stranger must not do it: for the bare writing a letter to a person, or parol request for a juror to appear, not by the party himself, hath been held within the statutes against embracery and maintenance. Co. Litt. 369. Hob. 294. 1 Saund. 391. If the party himself instruct a juror, or promise any reward for his appearance, then the party is likewise an embracer. And a juror may be guilty of embracery, where he, by indirect practices, gets himself sworn on the oaths, to serve on one side. 1 Lid. 513. There are divers statutes relating to this offence and maintenance. See further, tit. Maintenance, and post, Embracery. See also, tit. Jury, Decies Tentum.

EMBRACERY. An attempt to influence a jury corruptly to one side, by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for the person embracing, (the embracer,) is by fine and imprisonment; and for the juror so embraced, if he be by taking money, the punishment is (by various stats. of Edw. III. viz. 5 Edw. III. c. 16. 34 Edw. III. c. 8. 38 Edw. III. c. 12.) perpetual infamy, imprisonment for a year, and
forfeiture of tenfold value. 4 Comm. 140. See 1 Hawk. P. C. c. 85. and the preceding title.

EMBRING DAYS, from embers, cineres, so called, either because our ancestors, when they fasted, sat in ashes, or strewed them on their heads.] Those days which the ancient fathers called quatuor tempora jejunitii, and of great antiquity in the church: they are observed on Wednesday, Friday, and Saturday next after Quadragesima Sunday, (or the first Sunday in Lent,) after White Sunday, Holyrood-day in September, and St. Lucy's day: about the middle of December. These days are mentioned by Britton, c. 33. and other writers; and particularly in the stat. 2 & 3 Edw. VI. c. 19. Our almanacks call them the Ember Weeks.

EMBROIDERY. By stat. 22 Geo. II. c. 36. no foreign embroidery, or gold or silver brocade, shall be imported, upon pain of being forfeited and burnt, and penalty of 100/. for each piece. No person shall sell or expose to sale any foreign embroidery, gold or silver thread, lace, fringe, brocade, or make up the same into any garment, upon pain of having it forfeited and burnt, and penalty of 100/. All such embroidery, &c. found, may be seized and burnt, and the mercer, &c. in whose custody it was found, shall forfeit 100/. See tit. Manufactures, Navigation Acts.

EMENDALS, emenda.] An old word still made use of in the accounts of the society of the Inner Temple; where so much in emenda at the foot of an account, on the balance thereof, signifies so much money in the bank or stock of the houses, for reparation of losses or other emergent occasions: quod in restaurationem damni tribuitur. Stctm.

EMENDARE, emendam solvere.] To make amends for any crime or trespass committed. Leg. Edw. Confess. c. 35. Hence a capital crime, not to be atoned by fine, was said to be inemendable. Leg. Count. ft. 2.

EMENDATIO, Hath been used for the power of amending and correcting abuses, according to stated rules and measures; as emendatio fianti, the power of looking to the assise of cloth, that it be of just measure; emendatio fianti et cervisie, the assising of bread and beer, &c. privileges granted to lords of manors, and executed by their officers appointed in the court-leet, &c. Paroch. Antig. 196.

EMPANNEL, See Impannel.

EMPARLANCE, See Imparlance.

EMPEROR, imperator.] The highest ruler of large kingdoms and territories; a title anciently given to renowned and victorious generals of armies, who acquired great power and dominion. This title was formerly given to the kings of England, as appears by a charter of King Edgar.

ENBREVER, Fr.] To write down in short. Brit. 56.

ENCAUSTUM, See Incaustum.

ENCHANCEMENT, See Conjuration.

ENCHESON, old Fr.] An occasion, cause, or reason wherefore any thing is done. See the ancient Statutes.

ENDEAVOUR. Where one who has the use of his reason endeavours to commit felony, &c. he shall be punished by our laws, but not to that degree as if he had actually committed it: as if a man assaulted another on the highway, in order to a robbery, but...
takes nothing from him, this is not punished as a felony, because the felony was not accomplished; though, as a misdemeanor, it is liable to fine and imprisonment. 3 Inst. 68, 69. 161. 11 Rep. 98. And in this case, by stat. 7 Geo. II. c. 21. the offender shall be transported. See tit. Intendment, Malicious Mischief, Robbery.

ENDOWMENT. The bestowing or assuring of dowry on a woman. It is sometimes used metaphorically for the settling a provision upon a parson, or building of a church or chapel; and the severing a sufficient portion of tithes, &c. for a vicar, towards his perpetual maintenance, when the benefice is appropriated. See stats. 15 Rich. II. c. 6. 4 Hen. IV. c. 12.

ENEMY, inimicus.] Is properly an alien or foreigner, who, in a public capacity, and in a hostile manner, invades any kingdom or country; and whether such persons come hither by themselves, or in company with English traitors, they cannot be punished as traitors, but shall be dealt with by martial law. H. P. C. 10. 15. But the subjects of a foreign prince coming into England, and living under the protection of the king, may, if they take up arms, &c. against the government, be punished as traitors, not as alien enemies. If a prisoner be rescued by enemies, the gaoler is not guilty of an escape; as he would have been if subjects had made the rescue, when he might have a legal remedy against them. See Hawk. P. C. and tit. Alien, Escape; and as to adhering to, and succouring the king's enemies, see tit. Treason.

ENFRANCHISE, Fr. enfranchir.] To make free, or incorporate a man into any society, &c. It is also used where one is made a free denizen, which is a kind of incorporation in the commonwealth.

ENFRANCHISEMENT, Fr. from franchise, i. e. libertas.] Is when a person is incorporated into any society or body politic; and it signifies the act of incorporating. He that by charter is made a denizen, or freeman of England, is said to be enfranchised, and let into the general liberties of the subjects of the kingdom; and he who is made a citizen of London, or other city, or free burgess of any town corporate, as he is made partaker of those liberties that appertain to the corporation, is, in the common sense of the word, a person enfranchised. And when a man is enfranchised into the freedom of any city or borough, he hath a freehold in his freedom during life; and may not, for endeavouring any thing only against the corporation, lose and forfeit the same. 11 Rep. 91. See tit. Corporation. A villein was said to be enfranchised, when he was made free by his lord, and rendered capable of the benefits belonging to freemen.

ENGLECERY, or ENGLESCHIRE, engleceria.] An old word signifying the being an Englishman. When Canutus the Dane came to be king of England, he, at the request of the nobility, sent back his army into Denmark, but kept some Danes behind to be a guard to his person; and he made a law for the preservation of his Danes, (who were often privately made away with by the English,) that if an Englishman killed a Dane, he should be tried for the murder; or if he escaped, the town or hundred where the fact was done was to be amerced sixty-six marks to the king: so that after this law, whenever a murder was committed, it was necessary to prove the party slain to be an Englishman, that the town
might be exempted from the amercement; which proof was called englecery, or engleschire. And whereas if a person were privately slain, he was in ancient time accounted francigena, which word comprehended every alien, especially the Danes: it was therefore ordained, that where any person was murdered, he should be adjudged francigena, unless englecery were proved, and that it was made manifest he was an Englishman. The manner of proving the person killed to be an Englishman, was by two witnesses who knew the father and mother, before the coroner, &c. Bract. lib. 3. tract. 2. c. 15. Fleta, lib. 1. c. 30. 7 Rep. 15. This englecery, by reason of the great abuses and trouble that afterwards were perceived to grow by it, was utterly taken away by stat. 14 Geo. III. st. 1. c. 4. See 4 Comm. 195. and this Dict. tit. Murder.

ENGLISH Pleas, records, bonds, and proceedings in courts of justice to be in English. Stat. 4 Geo. II. c. 26. And see stats. 5 Geo. II. c. 27. 6 Geo. II. c. 14. and this Dict. tit. Pleading, Process, &c.

ENGRAVERS. See tit. Literary Property.

ENGROSSER. See Ingrosser, Forestaller.

To ENHANCE, To raise the price of goods or merchandise. See tit. Forestaller.

ENPLEET, Anciently used for inplead. They may enpleet and be enpleeted in all courts. Mon. Ang. tom. 2. fo. 412.

ENQUIRY, Writ of; See tit. Writ.

ENSEINT, or ENSEINT, The being with child. L. &. F. Dict.

ENSIENTURE, or Ensayency. Of any woman condemned for a crime, is no ground to stay judgment; but it may be afterwards alleged against execution. 3 Hale's Hist. P. C. 412.

ENTAIL, See tit. Tuit.

ENTERPLEADER, See Interpleader.

ENTIERTE, From the French entieré, entireness.] Is a contradiction in our books to moiety, denoting the whole: and a bond, damages, &c. are said to be entire, when they cannot be divided or apportioned.

ENTIRE TENANCY, Contrary to several tenancy, and signifying a sole possession in one man; whereas the other is a joint or common possession in two or more. Brooke.

ENTRY. Fr. entrée, i. e. ingressus, introitus.] Signifies the taking possession of lands or tenements, where a man hath title of entry: and it is also used for a writ of possession. This entry into lands is where any man enters into or takes possession of any lands, &c. in his proper person; and is an actual entry when made by a man's self, or by attorney by warrant from him that hath the right; or it is an entry in law, for a continuall claim is an entry implied by law, and has the same force with it. Litt. § 419. There is a right of entry, when the party claiming may, for his remedy, either enter into the land, or have an action to recover it; and a title of entry, where one hath lawful entry given him in the lands, which another hath, but has no action to recover till he hath entered. Plesw. 558. 10 Rep. 48. Finch's Law, 105.

Entry may be defined to be an extrajudicial and summary remedy, against certain species of injury by ouster, used by the legal owner, when another person, who hath no right, hath pre-
viously taken possession of lands or tenements. In this case, the party entitled may make a formal but peaceable entry thereon, declaring that thereby he takes possession; which notorious act of ownership, is equivalent to a feudal investiture by the lord: or he may enter on any part of it in the same county, declaring it to be in the name of the whole. Litt. § 417. But if it lies in different counties, he must make different entries; for the notoriety of such entry or claim to the farse or freeholders of Westmoreland, is not any notoriety to the farse or freeholders of Sussex. Also if there be two disseisors, the party disseised must make his entry on both: or if one disseisor has conveyed the lands with livery to two distinct feoffees, entry must be made on both. Co. Litt. 252. For as their seisin is distinct, so also must be the act which devests that seisin. If the claimant be deterred from entering by menaces or bodily fear, he may make claim as near to the estate as he can, with the like forms and solemnities; which claim is in force for only a year and a day. Litt. § 422. And this claim, if it be repeated once in the space of every year and day, (which is called continual claim,) has the same effect with, and in all respects amounts to, a legal entry. Ibid. § 419. 23. See this Dict. tit. Claims. Such an entry gives a man seisin; or puts into immediate possession him that hath right of entry on the estate; and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase. Co. Litt. 15.

This remedy by entry takes place in three only of the five species of ouster; viz. Abatement, Intrusion, and Disseisin; for, as in these, the original entry of the wrongdoer was unlawful, they may therefore be remedied by the mere entry of him who hath right. But, upon a discontinuance, or deforcement, the owner of the estate cannot enter, but is driven to his action: for herein the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant. Yet a man may enter on his tenant by sufferance: for such tenant hath no freehold, but only a bare possession; which may be defeated, like a tenancy at will, by the mere entry of the owner. But if the owner thinks it more expedient to suppose or admit such tenant to have gained a tortious freehold, he is then remediable by writ of entry, ad terminum qui habet nominem. 1 Inst. 57. 237, 238. See tit. Disseisin.

On the other hand, in case of abatement, intrusion, or disseisin, where entries are generally lawful, this right of entry may be sold, that is, taken away, by descent. Descents which take away entries, are, when any one, seised by any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir: in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate. Litt. § 385. 413.

In general, therefore, no man can recover possession by mere entry on lands, which another hath by descent. Yet this rule hath some exceptions; especially if the claimant were under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; in all
which cases, there is no neglect, or laches in the claimant, and therefore no descent shall bar or take away his entry. Co. Litt. 246. And this title of taking away entries by descent, is still further narrowed by stat. 32 Hen. VIII. c. 33. which enacts, that if any person disseises or turns another out of possession, no descent to the heir of the disseisor shall take away the entry of him that has right to the land, unless the disseisor had peaceable possession five years next after the disseisin. But the statute, on feudal reasons, does not extend to any feoffee or donee of the disseisor, mediate or immediate. Ibid. 256.

By the statute of limitations, 21 Jac. I. c. 16. it is enacted, that no entry shall be made by any man upon lands, unless within twenty years after this right shall accrue. And by stat. 4 & 5 Ann. c. 16. no entry shall be of force to satisfy the said statute of limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect. See further, ut. Claim.

This remedy by entry must be pursued, according to stat. 5 Rich. II. st. I. c. 8. in a peaceable and easy manner, and not with force or strong hand. For, if one turns or keeps another out of possession forcibly, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution: which puts the ancient possessor in statu quo; the criminal injury or public wrong, by breach of the king's peace, is punished by fine to the king. See this Dict. ut. Forcible Entry.

The writ of entry is a possessory remedy which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered, or continues possession. Finch's L. 261. The writ is directed to the sheriff, requiring him to "command the tenant of the land, that he render [in Latin, praecipe quod reddat] to the demandant the land in question, which he claims to be his right and inheritance; and into which, as he saith, the said tenant had not entry, but by (or after) a disseisin, intrusion, or the like, made to the said demandant, within the time limited by law for such actions; or that upon refusal he do appear in court on such a day, to show wherefore he hath not done it." This is the original process, the praecipe, upon which all the rest of the suit is grounded; wherein it appears, that the tenant is required, either to deliver seisin of the lands, or to show cause why he will not. This cause may be either a denial of the fact, of having entered by or under such means as are suggested, or a justification of his entry, by reason of title in himself, or in those under whom he makes claim; whereupon the possession of the land is awarded to him who produces the clearest right to possess it.

The writs of entry are of divers kinds, distinguished into four degrees, according to which the writs are varied. The first degree is a writ of entry sur disseisin, that lieth for the disseisee against a disseisor, upon a disseisin done by himself; and this is called a writ of entry in the nature of an assise.

Second, a writ of entry sur disseisin in le fier, against the heir by descent, who is said to be in the fier, as he comes in by his ancestor; and so it is if a disseisor make a seccolment in fec, gift in tail, i.e. the feoffee and donee are in the fier by the disseisor.

Third, a writ of entry sur disseisin in le fier et cui, where the
feoffee of a disseisor maketh a feoffment over to another; when the disseisee shall have this writ of entry sur disseisin, &c. of the lands in which such other had no right of entry but by the feoffee of the disseisor; to whom the disseisor demised the same, who unjustly, and without judgment, disseised the demandant. 1 Inst. 238.

These three degrees thus state the original wrong, and the title of the tenant who claims under such wrong. If more than two degrees (that is two alienations or descendents) were past, there lay no writ of entry at the common law. For, as it was provided for the quietness of men's inheritances, that no one, even though he had the true right of possession, should enter upon him who had the apparent right by descent or otherwise, but he was driven to his writ of entry to gain possession; so, after more than two descendents, or two conveyances were passed, the demandant, even though he had the right both of possession and property, was not allowed this possessory action; but was driven to his writ of right, a long and final remedy, to punish his neglect in not sooner putting in his claim while the degrees subsisted; and for the ending of suits, and quieting of all controversies. 2 Inst. 153. But by the stat. of Marlbridge, 52 Hen. III. c. 39. it was provided, that when the number of alienations or descendents exceeded the usual degrees, a new writ should be allowed without any mention of degrees at all. And accordingly,

Fourthly, a new writ has been framed, called a writ of entry in the post, which only alleges the injury of the wrongdoer, without deducing all the intermediate title from him to the tenant; stating it in this manner, that the tenant had not entry, unless after, or subsequent to, the ouster or injury done by the original dispossession; and rightly concluding, that if the original title was wrongful, all claims derived from thence must participate of the same wrong.

Upon the latter of these writs it is, (the writ of entry sur disseisin in the post,) that the form of our common recoveries of landed estates is usually grounded. See tit. Fine and Recovery.

This remedial instrument of writ of entry, is applicable to all the cases of ouster, except that of discontinuance of tenant in tail, and some peculiar species of deforcements. Such is that of the deforcement of dower, by not assigning any dower to the widow within the time limited by the law; for which she has her remedy by writ of dower, unde nihil habet. Fitz. N. B. 147. See tit. Dower.

But, in general, the writ of entry is the universal remedy to recover possession, when wrongfully withheld from the owner. It were therefore endless to recount all the several divisions of writs of entry, which the different circumstances of the respective demandants may require, and which are furnished by the laws of England, being plainly and clearly chalked out in that collection of legal forms, the Registrum Omnium Brevium, or registers of such writs as are issuable out of the king's courts; upon which Fitz-herbert's Natura Brevium is a comment, which see, and the several appropriate titles in this Dict.

In the times of our Saxon ancestors, the right of possession seems to have been recoverable only by writ of entry. Gilb. Ten. 42. This writ was then usually brought in the county court; and the proceedings in these actions were not then so tedious.
ENTRY.

(when the courts were held, and process issued from, and was returnable therein, at the end of every three weeks) as they became after the conquest, when all causes were drawn into the king's courts, and process issued only from term to term. Hence a new remedy was invented in many cases to do justice to the people, and to determine the possession in the proper counties by the king's judges; this was the remedy by assise, as to which, see tit. Assise in this Dict. and fully on this subject, 3 Comm. 174.—184.

Having said thus much in general on the titles Entry and Writs of Entry, subjects now in some measure rather unusual than obsolete, the following observations, extracts, &c. may be of use to the inquiring student; should any of them seem a repetition of what has already been said, it will be generally found they state the point more at large, or on different authorities.

A writ of entry in the per and cut shall be maintained against none, but where the tenant is in by purchase or descent; for if the alienation or descent be put out of the degree upon which no writ may be made in the per and cut, then it shall be made in the post. Terms of ley.

There are five things which put the writ of entry out of the degrees, viz. intrusion; disseisin upon disseisin; succession, where the disseisor was a person of religion, and his successor enters; judgment, when a person hath had judgment to recover against the disseisor; and escheat, on the disseisor's dying without heir, or committing felony, &c. on which the lord enters, &c. In all these cases, the disseisee or his heir, shall not have a writ of entry within the degrees of the per, but in the post; because they are not in by descent, or purchase. Terms de Ley.

Degrees as to entries are of two sorts, either by act in law, as in case of a descent; or by act of the party by lawful conveyance. But no estate granted by wrong doth make a degree; so that abatement, intrusion, &c. work not a degree; nor doth every change by lawful title, as an estate of tenant by the curtesy, by judgment, &c. or of any others that come in the post; though a tenancy in dower by assignment of the heir doth work a degree, because she is in by her husband; but an assignment of dower by a disseisor doth not, by reason she is in the post. Co. Litt. 239.

Though entry on lands is taken away by descent on disseisins, or disconinuance, &c. yet a descent shall not take away the entry of lessee for seven years, nor of tenant by elegit, &c. who have but a chattel, and no freehold; otherwise it is of any estate for life, or any higher estate. Co. Litt. 249.

If a disseisor leases for years, and dies seised of the reversion, the entry of the disseisee is taken away, because he died seised of the fee and freehold: but if he had leased for life, &c. the entry of the disseisee would not be taken away. Co. Litt. 239. Where the disseisor of an infant dies seised, and after the infant comes of age, and the heir of the disseisor dies before entry; though he died not seised of an actual seisin, but a seisin in law; yet his dying seised takes away the entry of the disseisee. Ibid. If a disseisor makes a feoffment upon condition, and the feoffee dies seised, and the feoffor enters upon the heir for the breach of the
condition, the disseisee may enter upon him; for by the entry of
the disseisor, the descent is utterly defeated. Litt. sect. 409.

The title of entry in a feoffor, &c. that hath but a condition,
cannot be taken away by any descent, because he hath no remedy
by action to recover the land; so that if a descent should take away
his entry, it would bar him of his right for ever; and the con-
dition remains, and cannot be de vested and put out of possession,
as the lands, &c. Co. Litt. 240. If a man recovers lands, and
after a stranger to the recovery dies seised, this shall not take
away the entry of the recoveror; as it was but a title. 2 Danv.
Abr. 561. But where a person recovers against another, and enters
and sues execution, and after the receover disseises him, and
dies seised; this descent shall take away the entry of the rece-
over, for the recovery was executed. Ibid.

If after recovery against tenant for life, he dies, and he in re-
mainder enters before execution, and dies seised, the entry of
the recoveror is not taken away. Co. Litt. 238. The entry of the
tenant for life shall be good for him in remainder; and if tenant
for life make a feoffment in fee, and a stranger enters for the
forfeiture in the name of the reverserion, this will be good to
vest the reversion in him. Litt. 123. 9 Rep. 106. If an infant
under age makes a deed of feoffment, and after his full age
the feoffee dies seised; or a lessee for life alien the land, and the
alienne dies seised thereof; or a devise be of lands upon condition,
and the heir of the disseisor enters and dies seised: in these
cases the entry is gone, and the parties shall be put to their action.
Litt. 96. 9 Hen. VI. 25.

If there be tenant for life, remainder to the right heir of J. S.
and the tenant for life is disseised; a descent is cast, and after J.
S. dies, and tenant for life also dies: by this, the entry of the heir
of J. S. is not taken away; for his remainder was in custodia legi.
1 Rep. 134. Where an infant has cause of entry, and the descent
happens while he is within age, it will not bar him of his entry:
he that hath the right of entry, must be of age, within the four
seas, of sound memory; and if it be a woman, she must be sole;
and if the party be under age, beyond the seas, non compos mentis,
in prison, or a feme covert, at the time of the descent, it shall not
bar. Litt. 147. 402. 21 Hen. VI. 17.

The whole time from a disseisin is considerable; as where
feme covert is disseised, and her husband dies, and she takes
another husband, and then a descent is cast; or if one ultra mare
be disseised, and he return into England, and then go beyond sea
again, and there is a descent; here the descent will bar the entry,
because of the interim. 9 Hen. VII. 24. Dyer, 143. 32 Hen.
VIII. c. 33.

A woman tenant in tail took husband, who made a feoffment
in fee, and died, and the wife without entry made a lease for
years; and it was held, that the freehold was not reduced by the
lease, without an entry made. 1 Leon. Cas. 165. The entry of a
disseisee, when he duly makes it, shall avoid all the mesne chal-
ges by the disseisor upon the land; but right of entry may be
lost divers ways; as by acceptance of rent, by him who hath it,
and the like. 1 Anderson, 133. Noy's, Rep. 7. If a man is disseis-
ed of land, whereby a common is appendant, the disseisee cannot
use the common till he enters on the land to which the common
is appendant; for if the disseisee might use it, so might the dis-
seisor, which would be a double charge on the common: yet
if a person be disseised of a manor, to which an advowson is appen-
dant, he may present to the advowson before entry on the manor.
Co. Litt. 122.

A disseisee enters into the land, and continues therein with the
disseisor; and manures it with him, claiming nothing of his first
estate; or if the disseisee enters, and takes the profit, as lessee,
&c. of the disseisor; it is said these will be an entry that
will reduce the first estate. 2 Danw. 790. If the disseisee
commands a stranger to put in the cattle of such stranger in
the land to feed there; this is an entry in law on the land. Co.
Litt. 245.

Where entry may be made into land, or anything, it shall not
be in the party before entry: if entry cannot be made, but only
claim, then it shall be in him by claim, and when neither entry
nor claim can be made, it shall be in him by act of law. 1 Plowd.
133. In case the possession of land is in no man, but the freehold
in law is in the heir that enters, his general entry into one part
reduces all into his actual possession: but if an entry is to devest
an estate, a general entry into parcel, is good only for that part.
Co. Litt. 15. Where an entry is in any part, it must be in the
name of all: if I enfeoff a person of an acre of ground upon con-
dition, and of another acre on condition, and both conditions
are broken, here entry into one in name of both acres is not
good to reduce both: but if a man make a feoffment of divers
parcels upon condition that is broken, there entry into part in name
of all the rest is sufficient. Co. Litt. 252. 9 Hen. VII. 25.

A man hath right to enter into lands in divers villages in one
county, if he enter upon part of it in one village in the name of
all in that county; by this he shall have possession of the whole.
Co. Litt. 252. Dyer, 227. 337. If a man disseise me of one
acre at one time, and another acre at another time, in the same
county; my entry into one of them in the name of both is good:
though it will not be good, if the disseisine be by two several per-
sons, or if the acres lie in several counties; in which case there
ought to be several entries and actions. Co. Litt. 252.

If he who hath right of entry into a freehold, enters into part of
it, it shall be adjudged an entry into all possessed by one tenant;
but if there be several tenants possessed of the freehold, there
must be several entries on the several tenants. 1 Litt. Abr. 515,
516. Special entry into a house with which lands are occupied,
claiming the whole, is a good entry as to the whole house and lands.
Ibid. If a husband enters to the use of his wife; or a man enters
to the use of an infant, or any other, where the entry is lawful; this
settles the possession before agreement of the parties: though it
is otherwise where a person enters to the use of one whose entry
is not lawful; for this vests nothing in him till agreement, and
then he shall be a disseisor. 2 Danw. 787. If two joint-tenants
are disseised, and the disseisor aliens, and one joint-tenant enters,
upon the alience to the use of both; this settles the freehold in
both of them. Ibid. 788. But if one coparcener, &c. enters
especially claiming the whole land, she gains the part of her com-
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panion by abatement; and it shall not settle any possession in the other. Co. Litt. 243.

The heir is to enter into lands descended to him, to entitle him to the profits. Co. Litt. 214. If a younger son enters on lands in fee, where the eldest son dies leaving issue; though many descendents are cast in his line, yet the heirs of the eldest son may make an entry on the lands; but if the youngest son convey away the lands in fee, and the fooffee dies seised, they may not enter; nor may they enter where the younger son disseises the eldest, and dies seised. Co. Litt. 237. 244. Litt. § 397.

A tenant in tail hath issue two sons, and the eldest dies, leaving his wife privenement enoint of a son, and the younger brother enters, and then the wife of the eldest is delivered of a son, he may enter upon the younger brother. 2 Dowl. 557. See tit. Descent.

An estate of freehold will not cease, without entry or claim; also a remainder of an estate of freehold cannot cease, without entry, &c. no more than estate of freehold in possession. Cro. Eliz. 380. A right of entry preserves a contingent remainder. 2 Lev. 55. And a grantee of a reversion may enter for a condition broken. Plot. 176.

A lessee must enter into lands demised to him; and though the lessee dies before the lessee enters, yet he may enter; and if the lessee dies before entry, his executors or administrators may enter. The lessee may assign over his term before entry, having interesse termnini; but he may not take a release to enlarge his estate; or bring trespass, &c. till actual entry. Though if there be words bargain and sell in a lease, &c. for consideration of money, the lessee or bargaineer is in possession on executing the deed, to make a release, &c. Litt. 59. 454. Co. Litt. 46. 57. 270.

Where a lessor enters on his lessee for years, the rent is suspended. 1 Leon. 110. But without entry and expulsion, the lessee is not discharged of his rent to the lessor, unless it be where the lessor is attainted of treason, &c. then the rent is to be paid to the king, who is in possession without entry. 4 Edw. Ayr. 706.

There is no need of entry to avoid an estate in case of a limitation, because, whereby, the estate is determined without entry or claim; and the law casts it upon the party to whom it is limited. If A. devises lands to B. and his heirs, and dies, it is in the devisee immediately; but till entry he cannot bring a possessory action: and where a possession vests without entry, a reversion will vest without claim. 2 Mod. Ref. 7. 8. A bare entry on another, without an expulsion, makes only a seisin; so that the law will adjudge him in possession who hath the right. 3 Salk. 135.

Where a person is in a house with goods, &c. the house may be entered when the doors are open, to make execution. Cro. Eliz. 759. But it must be averred that the goods were in the house. Lucrin. 1428. 1434. And a man cannot enter into a house, the doors being open, to demand a debt, unless he aver that the debtor is within the house at the same time. Cro. Eliz. 6. 8. So entry may be made on a tenant where rent is in arrear, to take a distress, &c. See tit. Execution, Rent, Demand.
In order to regain possession of lands by entry, &c., the manner of entry is thus: If it be a house, and the door is open, you go into it, and say these words—*I do here enter, and take possession of this house.* But if the door be shut, then set your foot on the groundsel, or against the door, and say the before words: and if it be land, then go upon the land, and say, *I here enter and take possession of this land,* &c. If another do it for you, he must say, *I do here enter, &c., to the use of A. B.* And it is necessary to make it before witnesses, and that a memorandum be made of it. *Litt. 385. Co. Litt. 237, 238.*

Where an ejectment will lie, the confession of lease, entry, and ouster is sufficient in all cases, except in the case of a fine with proclamations, in which case it is necessary to prove an actual entry; and the lessor of the plaintiff directing one to deliver a declaration to the tenant in possession, will not amount to such an entry. See tit. Ejectment.

As to a power of entry limited by way of use, see 1 Inst. 203. a. in n.

**Entry ad Communem Legem.** Is the writ of entry which lies where tenant for term of life, or for term of another's life, or by the curtesy, &c., aliens and dies; he in the reversion shall then have this writ against whomsoever is in possession of the land. *New Nat. Brev. 561.*

**Entry ad Terminum qui Preterit.** A writ of entry anciently brought against tenant for years, who held over his term, and thereby kept out the lessor. See *New Nat. Brev. 447, 448.* But an ejectment is now the common mode of proceeding; and by stat. 4 Geo. II. c. 28. tenants for term of years, &c., holding over after demand made, are subject to double rent. See tit. Rent, Ejectment, Tenant.

**Entry in Casu Consimili.** Is a writ that lies for him in reversion by stat. *West. 2. c. 24.* against tenant for life, or tenant by the curtesy, who aliens in fee, &c. See *Casu Consimili.*

**Entry in Casu Proviso.** Where a tenant in dower aliens in fee, or for term of life, or of another's life; then he in the reversion shall have this writ, provided by the stat. of *Glotic. 6 Edw. I. cap. 7,* by which statute it is enacted, "that if a woman alien her dower in fee, or for life, the next heir, &c., shall recover by writ of entry." See tit. Dower. And the writ may be brought against the tenant of the freehold of the land, on such alienation, during the life of the tenant in dower, &c. *New Nat. Brev. 456.*

The above four writs of entry may all be brought either in the per, or in the cuius post.

**Entry sine Assensu Capituli.** A writ of entry that lay where a bishop, abbot, &c., aliened lands or tenements of the church, without the assent of the chapter or convent. *Fitz. N. B. 195.*

**Enure.** In law, to take place or be available; it is as much as *effectum:* as for example; a release made to the tenant for life, shall enure, and be of force and effect to him in the reversion. *Litt.*

**Eodorbrace, from the Sax. eoder, a hedge, and brice, ruptura.]** Hedge-breaking: in which sense it is mentioned in the laws of King *Alfred, cap. 45.*

**Forle, Sax. for earl, &c., though made use of by the Danes, for barons.** See *Earl.*
EPIMENIA, Expenses or gifts. Blount.

EPHYPANY, The day when the star appeared to the wise men at Christ's nativity, generally called twelfth day.

EPISCOPALIA, Synodals, or other customary payments from the clergy to their bishop or diocesan; which were formerly collected by the rural deans, and by them transmitted to the bishop. Mon. Ang. tom. 3. p. 61. These customary payments have been otherwise called onus episcopale; and were remitted by special privilege to free churches and chapels of the king's foundation, which were exempt from episcopal jurisdiction. Ken. Gloss.

EPISCOPUS PUEORUM. It was a custom in former times that some lay person about a certain feast should plait his hair, and put on the garments of a bishop, and in them exercise episcopal jurisdiction, and do several ludicrous actions, for which reason he was called bishop of the boys: and this custom obtained here long after several constitutions were made to abolish it. Mon. Ang. tom. 3. p. 159.

In an old work, printed under the title of the Processionale of the church of Sarum, is contained the service of that church on this occasion, which appears to have taken place on the day of the Holy Innocents. The service is very short, and is set to music. Blount. From the monuments in some of the cathedrals it appears, that the episcopus puerorum was himself a boy; (generally of the choir.) His office lasted about a month; and if he died while in office, he was buried in pontificabius.

EQUALITY. The law delights in equality; so that when a charge is made upon one, and divers ought to bear it, he shall have relief against the rest. 2 Reph. 25. And where a man leaves a power to his wife to give an estate among three daughters, in such proportions as she shall think fit; it has been held she must divide it equally, unless good reason be given for doing otherwise. Preced. Can. 256. See tit. Contribution.

In equity it is a maxim, that “equality is equity.” See Francis's Maxims, fol. 9. sc.

EQUES AURATUS. Lat.] Is taken for a knight; because anciently none but knights were allowed to beautify and gild their armour with gold: but this word is rather used by the heralds than lawyers; for eques auratus is not a word in our law for knight, but miles, and formerly chevalier. 4 Inst. 5.

EQUITY.

(Equitas; quasi, equalitas.] Is defined to be a correction, or qualification of the law, generally made in that part wherein it faileth, or is too severe. In other words, “the correction of that wherein the law, by reason of its universality, is deficient.” 1 Comm. 62. It likewise signifies the extension of the words of the law to cases unexpressed, yet having the same reason; so that where one thing is enacted by statute, all other things are enacted that are of the like degree: for example, the statute of Gloucester gives action of waste against him that holds lands for life or years; and, by the equity thereof, a man shall have action of waste against a tenant that holds but for one year, or half year, which is without the words of the act, but within the meaning of it; and the words that enact the one, by equity enact the other. Terms de Ley.
So that equity is of two kinds; the one doth abridge and take from the letter of the law; and the other enlarge and add there-to. *Equitas est perfecta quaerit ratio, quæ jus scriptum interpreteratur et emendat.* Co. Litt. 24. And statutes may be construed according to equity; especially where they give remedy for wrong, or for expedition of justice. &c. Co. Litt. 24. 54. 76. 2 Inst. 106. 107. &c.

A court of equity cannot now be created by the king, but the same must be done by act of parliament. 4 Inst. 84.

The distinction between law and equity, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country than England at any time. With us the *aula regia*, which was anciently the supreme court of judicature, undoubtedly administered equal justice according to the rules of both, or either, as the case might chance to require; and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by *Bracton*, 1 Co. 7. pl. 23. as a thing contrasted to strict law, yet neither in that writer, nor in *Glaneville* or *Plea*, nor yet in *Britton*, (composed under the auspices and in the name of *Edw. I.*, and treating particularly of courts, and their several jurisdictions,) is there a syllable to be found relating to the equitable jurisdiction of the court of chancery. It seems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person, assisted by his privy council; (from whence also arose the jurisdiction of the court of requests, which was virtually abolished by stat. 16 *Car. I.* c. 10.) and they were wont to refer the matter either to the chancellor and a select committee, or, by degrees, to the chancellor only, who mitigated the severity, or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our *Saxon* ancestors, before the institution of the *aula regia*, but also after its dissolution, in the reign of *King Edw. I.* and perhaps during its continuance, in that of *Hen. II.* 11 *Edw. c. 2.* *Lamb.* Arch. 59.

When, about the end of the reign of *King Edw. III.*, uses of land were introduced, and though totally disconsonanted by the courts of common law, were considered as fiduciary deposits, and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established. *Stetm. Gloss.* 106. 1 Lev. 242. *John Waltham*, who was bishop of *Salisbury*, and chancellor to *King Richard II.* (by a strained interpretation of the statute of *Westm.* 2. [13 *Edw.* I. c. 24.]) enabling the clerks in chancery to form new writs according to the special circumstances of each case,) devised the writ of *subpœna*, returnable in the court of chancery only, to make the feoffee to uses accountable to his *cestui que use*; which process was afterwards extended to other matters wholly determinable at the common law, upon fictitious suggestions; for which therefore the chancellor is, by stat. 17 *Rich.* II. c. 6. directed to give damages to the party unjustly aggrieved. But as the clergy had long attempted
to turn their ecclesiastical courts into courts of equity, by entertaining suits pro Imsione fidei, as a spiritual offence against conscience, in case of non-payment of debts, or any breach of civil contracts, till checked by the constitutions of Clarendon; (10 Hen. II. c. 15) therefore, probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new acquired jurisdiction; especially as the spiritual courts continued to grasp at the same authority as before, till finally prohibited by the unanimous concurrence of all the judges; however, it appears from the parliament rolls, that in the reigns of Hen. IV. and V. the commons were repeatedly urgent to have the writ of subpoena entirely suppressed, as being a novelty devised against the form of the common law. But though the statute 4 Hen. IV. c. 23. was passed, whereby judgments at law are declared irrevocable, unless by attain or writ of error, yet in Edw. IV.'s time, the process by bill and subpoena was become the daily practice of the court, though its jurisdiction was not then nearly so extensive as at present. Rot. Parl. 14 Edw. IV. n. 33.

In the time of Lord Chancellor Ellesmere, (A. D. 1616,) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the court of king's bench; whether a court of equity could give relief after or against a judgment at the common law. This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a 

premised by questioning, in a court of equity, a judgment in the court of king's bench, obtained by gross fraud and imposition. This matter being brought before the king, was, by him, referred to his learned counsel for their advice and opinion; who reported so strongly in favour of the courts of equity, that his majesty gave judgment on their behalf. Whitelock of Parl. 2. 390. 1 Ch. Rep. App. 11.

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system; his successors, in the reign of Charles I. did little to improve upon his plan, till the appointment of Sir Hencage Finch, in 1673, who became afterwards Earl of Nottingham. He was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endowed with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade, and the abolition of military tenures, coöperated in establishing his plan, and enabling him, in the course of nine years, to build a system of jurisprudence and jurisdiction, upon wide and national foundations, which have also been extended and improved by many great men, who have since presided in chancery. See 3 Comm. 50—56.

The same jurisdiction is exercised, and the same system of redress pursued, in the equity court of the exchequer; with a dis
tion, however, as to some few matters peculiar to each tribunal, and in which the other cannot interfere.

Upon the abolition of the court of wards, the care, which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feodal view, but resulted to the king in his court of chancery, together with the general protection of all other infants in the kingdom. Fitz. N. B. 27. When, therefore, a fatherless child has no other guardian, the court of chancery has a right to appoint one; and from all proceedings relative thereto, an appeal lies to the house of lords. The court of exchequer can only appoint a guardian ad litem, to manage the defence of the infants, if a suit be commenced against him; a power which is incident to the jurisdiction of every court of justice. Cro. Jac. 641. 2 Lev. 163. T. Jones, 90. But when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal, indiscriminately, will take care of the property of the infant.

As to idiots and lunatics, the king himself used formerly to commit the custody of them to proper committees in every particular case; but now, to avoid solicitations, and the very shadow of undue partiality, a warrant is issued by the king, under his royal sign manual, to the chancellor, to perform this office for him; and if he acts improperly in granting such custodies, the complaint must be made to the king himself in council. 3 P. Wins. 108. See Reg. Br. 257. But the previous proceedings on the commission, to inquire whether or no the party be an idiot or a lunatic, are on the law side of the court of chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

The king, as parens patriae, has the general superintendence of all charities, which he exercises by the chancellor. And therefore, when necessary, the attorney-general, at the relation of some informant, (who is usually called the relator,) files ex officio an information in the court of chancery to have the charity properly established.

By stat. 43 Eliz. c. 4. authority is given to the lord chancellor, and to the chancellor of the duchy of Lancaster, respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the petty-bag office of the court of chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent, in his answer to the exceptions, may allege what new matter he pleases: upon which they go to proof, and examine witnesses in writing upon all the matters in issue; and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And as it is thus considered as an original cause throughout, an appeal lies of course from the chancellor's decree to the house of peers, notwithstanding any loose opinions to the contrary. Duke's Char. Uses, 62. 128. 2 Vern. 118.

By the several statutes relating to bankrupts, a summary juris-
diction is given to the chancellor, in many matters consequential or previous to the commissions thereby directed to be issued; from which the statute gives no appeal.

The jurisdiction of the court of chancery doth not however extend to some causes, wherein relief may be had in the exchequer. No information can be brought in chancery for such mistaken charities as are given to the king by the statutes for suppressing superstitious uses. Nor can chancery give any relief against the king; or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee. Such causes must be determined in the court of exchequer, as a court of revenue; which alone has power over the king’s treasure, and the officers employed in its management, unless where it properly belongs to the duchy court of Lancaster.

In all other matters, what is said of the court of equity in the court of chancery will be equally applicable to the other courts of equity. Whatever difference there may be in the forms of practice, it arises from the different constitution of their officers. See 3 Comm. 426—429.

The learned Commentator then enters into a brief but comprehensive view of the general nature of equity; to show that in our courts it is not contrary to, but consistent with, law; a position which perhaps will be best understood by further explanation of the jurisdiction exercised by courts of equity, either as assistant to, concurrent with, or exclusive of, the jurisdiction of the courts of common law, which is here done in an abridgment from Fonblanque’s Treatise of Equity, p. 10. &c. in n.

Equity is assistant to the jurisdiction of the courts of law; 1st. By removing legal impediments to the fair decision of a question depending in courts of law. 2dly. By compelling a discovery, which may enable them to decide. 3dly. By perpetuating testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. It may also be said to be assistant, by rendering the judgment of courts of law effective, as by providing for the safety of property in dispute pending a litigation, and by countering fraudulent judgments, &c. and by putting a bound to vexatious and oppressive litigation. It exercises a concurrent jurisdiction with courts of law, in most cases of fraud, accident, mistake, account, partition and dower. It claims an exclusive jurisdiction in all matters of trust and confidence; and wherever, upon the principles of universal justice, the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent. See Milford’s Treatise on the Pleadings in Chancery.

To pursue this division of the jurisdiction of courts of equity with that minuteness which is necessary to a particular acquaintance of its powers, would lead to an investigation too extensive. Some short notice shall be taken of the general objection that is urged against the claims of courts of equity to a concurrence of jurisdiction in some cases with courts of law. This concurrence of jurisdiction may, in the greater number of cases in which it is exercised, be justified by the propriety of preventing a multiplicity of suits; for as the mode of proceeding in courts of law requires the plaintiff to establish his case, without enabling him to draw the
necessary evidence from the examination of the defendant, justice
could never be attained at law in those cases where the principal
facts to be proved by one party are confined to the knowledge of
the other party. In such cases, therefore, it becomes necessary
for the party, in want of such evidence, to resort to the extraor-
dinary powers of a court of equity, which will compel the neces-
sary discovery; and the court having acquired cognisance of the
suit, for the purpose of discovery, will entertain it for the purpose
of relief, in most cases of fraud, account, accident, and mistake;
and for other reasons will entertain suits for partition and dower,
though discovery be not necessary to the plaintiff’s case.

The case (and it seems the only case) in which fraud cannot be
relieved against equity, concurrently with courts of law, though
discovery be sought, is the case of fraud, in obtaining a will;
which, since the case of Kerrick v. Bransby, 3 Brown’s Parl. Cas.
388, is constantly referred to a court of law in the shape of an is-
220. se
221. su
222. e
issue, dispositio vet non. That courts of equity have a concurrence
of jurisdiction with courts of law, in all other matters of fraud,
Wms. 220. 2 Comyn’s Digest, tit. Chancery, Fraud.

The jurisdiction exercised by courts of equity in matters of ac-
count, is, in many cases, bounded by the discovery: as where a
suit is instituted for an account of waste of timber, without pray-
ing an injunction, the plaintiff cannot have a decree for relief.
Jesus College v. Bloome, 3 Atk. 262. Piers v. Piers, 1 Vez. 521.
But where the bill seeks an account of ore dug, the court will de-
cree it; (Bishop of Winchester v. Knight, 1 P. Wms. 406,) be-
cause the working of a mine is a kind of trade. Story v. Lord
Windsor, 2 Atk. 630. Yet, even in that case, the plaintiff must
show a possession. Sayer v. Pierce, 1 Vez. 232. Neither will
equity, in all cases, decree an account of mesne profits, for where
a man has title to the possession of lands, and makes an entry,
whereby he becomes entitled to damages at law for the time that
possession was detained from him, he shall not, after his entry,
turn that action at law into a suit in equity, and bring a bill for an
account of the profits, except in the case of an infant, or some
other very particular circumstances. Tilly v. Bridge, Pre. Ch.
223. Owen v. Aprize, 1 Ch. Rep. 17. The particular circum-
cumstances excepted by the Lord Keeper, in laying down this rule,
extend to all those cases which involve an equity, which the plain-
134. Duke of Bolton v. Deane, Pre. Ch. 5, 6. Dormer v. Fortesc-
Frecker, 1 Atk. 524. See also Curtis v. Curtis, Rolls, 2 Bro. C.R.
622. The jurisdiction exercised by our courts of equity, in most
cases of accident, presents a very striking instance of their anxi-
ty to prevent innovation on the jurisdiction of courts of law: their
interference being generally founded on some circumstance which
prevents the party being relievable at law; as where a bond or
other instrument or security is lost, equity will interfere, by com-
pelling a discovery from the defendant, and will relieve upon such
discovery; but the plaintiff is not entitled to any relief, upon a
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mere suggestion that the bond, instrument, or security, is lost; but
is required, for the purpose of relief, to annex to his bill an af-
fidavit to such effect. 3 Atk. 17. Mitford's Treatise, 112. And,
as a further security against innovation, it must appear that the
loss of the deed or instrument obstructs the plaintiff in seeking
relief at law; for the loss of a deed is not always a ground to come
into a court of equity for relief; if there was no more in the case,
although he is entitled to have a discovery of that, whether lost
or not, courts of law admit evidence of the loss of a deed, proving
the existence of it and its contents, just as a court of equity does.
There are two grounds to come into equity for relief, annexing
an affidavit to the bill. First, where the deed is destroyed or con-
cealed by the defendant; and whenever that is the case, the plain-
tiff is entitled to have relief in this court, upon the reason in
Lord Husdon's case. Hob. 109. Another is, where the plain-
tiff cannot recover at law, without making profert of the deed in
pleading at law. Whitfield v. Feuaset, 1 Vez. 392. 2 Atk. 61.
The judgment of the court of king's bench in Reed v. Brook-
man, (3 Term Rep. 151.) seems to have relieved the obligee from
the necessity of coming into equity, upon the mere circumstance
of the bond or instrument being lost; by allowing him to state
such circumstances in his declaration, as a reason for not making
profert of it; but, upon this case being cited in chancery, as fur-
nishing an objection to the plaintiff's suit in equity, he being re-
lievable at law, Lord Thurlow observed, that the court of king's
bench having determined to give relief in a case formerly relieva-
ble only in equity, was not a reason for excluding the ancient, pe-
culiar, and, at least, concurrent, jurisdiction of courts of equity.
Atkinson v. Leonard, 3 Bro. C. R. 218. This concurrence of ju-
sisdiction as to this kind of accident, may therefore be consider-
ed to extend to all cases in which the deed or instrument has
been destroyed, or is concealed by the defendant, or has been lost
by the plaintiff; though of the contents of such instrument the
plaintiff has other evidence of which he might avail himself at
law. But where the relief sought in equity is upon the loss of a
bill of exchange, or promissory note, the plaintiff must, by his
bill, offer to give security, as an indemnity to the defendant against
any demand being made upon him in respect of such lost bill or
To establish the origin of any branch of legal or equitable ju-
sisdiction is always difficult, and seldom necessary, provided the
exercise of such jurisdiction is sanctioned by the dictates of rea-
son, and found to be conducive to the ends of substantial justice;
and such will appear to be the nature and tendency of the juris-
diction exercised by our courts of equity in cases of partition,
upon a reference to the difficulties which obstructed the mode of
proceeding at common law; and though many of those difficulties
are removed by stat. 3 & 9 W. III. c. 31. yet still, if the parties
are in any degree complicated, it is extremely difficult to proceed
at law, or where the tenants in possession are seised of particular
estates only; for the persons entitled in remainder cannot be bound
by the judgment, in a writ of partition. Mitford's Treatise, p.
110. Neither can a feme covert be bound by partition by writ; Co.
Litt. 106. a which, it should seem, she may be by decree and com-
mission in equity. Martyn v. Perryman, 1 Ch. Ref. 125. On these considerations, and the almost constant occasion that the parties have for a discovery, is founded this branch of equitable jurisdiction; in the exercise of which our courts of equity are constantly governed by an anxious attention to the legal title of the plaintiff: for though, at law, it be sufficient to allege seisin, yet, in equity, the plaintiff must show his title. Curwen v. Putney, 2 Atk. 380. And if the defendant contest the legal title, the court will dismiss the bill; Bishop of Ely v. Kenrick, Bunn. 322. but see Parker v. Gerard, Ambler, 236. And as a further mean to prevent innovation and vexatious suits, courts of equity will never allow costs on bills of partition; courts of law allowing none on the proceeding by writ. Metcalfe v. Beckwith, 2 P. Wms. 376. Mitford's Treatise, 111. And this rule prevails, notwithstanding the unequal interests of the parties. Parker v. Gerard, Ambler, 236. See, on this subject of partition in equity, also 1 Inst. 169. b. and the notes there, which are very ingeniously combated, we may say refuted, by Mr. Ponblanche, who sums up the result in the foregoing paragraph.

The jurisdiction of our courts of equity, in matters of dower, for the purpose of assisting the widow with a discovery of the lands or title deeds, or of removing impediments to her rendering her legal title available at law, has never been doubted. But it has been questioned whether equity could give relief in those cases, in which there appeared to be no obstacle to her legal remedy. Wallis v. Euerard, 3 Ch. Ref. 87. It seems now, however, to be settled, that the widow labours under so many disadvantages at law, from the embarrassments of trust terms, &c. that she is fully entitled to every assistance that a court of equity can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained. Curtis v. Curtis, 2 Brown's C. R. 634. and Lucas v. Calcraft, there cited. And in the exercise of this jurisdiction, courts of equity will even enforce a discovery against a purchaser for valuable consideration without notice. Williams v. Lambe, 3 Bro. Ch. Ref. 264. And though the widow should die before she had established her right to dower, equity will, in favour of her personal representatives, decree an account of the rents and profits of the lands, of which she afterwards appeared dowable.

With respect to the exclusive jurisdiction exercised by our courts of equity in matters of trust, and in those cases where the principles of substantial justice entitle the party to relief, but the positive law is silent, it seems impossible to define with exactness its boundaries, or to enumerate with precision its various principles. In the course of this work, however, a variety of instances appear, from which the wisdom of this branch of equitable jurisdiction will be fully and satisfactorily established, and to which, at present, it may be sufficient to refer. See particularly, tit. Chancery, Fraud, Trust, &c. &c.

The essential difference (says Blackstone) between law and equity, principally consists in the different modes of administering justice in each, in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, viz. the true construction of securities for money
lent, and the form or effect of a trust or second use, hath been principally erected that structure of jurisprudence which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the system of the courts of common law.

As to the mode of proof. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him, upon oath, with regard to the truth of the transaction; and, that being once discovered, the judgment is the same in equity as it would have been at law. But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account. 1 Chan. Cas. 57. As incident to accounts, they take a concurrent cognizance of the administration of personal assets; 2 P. Wms. 145. consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. 2 Chan. Cas. 132. As incident to accounts, they also take the concurrent jurisdiction of titles, and all questions relating thereto; 1 Eq. Cas. Abr. 367. of all dealings in partnership, 2 Vern. 277. and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents. Ibid. 633.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud; 2 Chan. Cas. 46. all matters in the private knowledge of the party, which, though concealed, are binding in conscience; and all judgments at law obtained through such fraud or concealment. And this not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking an advantage of a judgment obtained by suppressing the truth. 3 P. Wms. 148. Year Book, 22 Edw. IV. 37. p. 21. See tit. Discovery.

The mode of trial is by interrogatories administered to the witnesses, upon which their depositions are taken in writing; wherever they happen to reside. If, therefore, the cause arises in a foreign country, and the witnesses reside upon the spot; or, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if the witnesses residing at home are aged or infirm, any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction which might have been exercised at law, if the witnesses could probably attend. See tit. Depositions.

With respect to the mode of relief. The want of a more specific remedy than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution, unless where it is improper or impossible, instead of giving damages for their non-performance. Eq. Cas. Abr. 16. And hence a fiction is established, that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally; and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. 3 P. Wms. 213. So, of waste, and other similar injuries, a court
of equity takes a concurrent cognisance, in order to prevent them by injunction. 1 Ch. Rep. 142. Ch. Cas. 323. Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a jurisdiction, to prevent the expense and vexation of endless litigation and suits. 1 Vern. 308. Fr. Ch. 261. 1 P. Wms. 672. St. 464. In various kinds of fraud it assumes a concurrent jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief. 2 P. Wms. 156. As by setting aside fraudulent deeds, decreeing reconveyances, or directing an absolute conveyance merely to stand as a security. 1 Vern. 324. 1 P. Wms. 239. 1 Vern. 237. 2 Vern. 84. And thus, lastly, for the sake of a more beneficial and complete relief, by decreeing a sale of lands, a court of equity holds plea of all debts, encumbrances, and charges that may affect it, or issue thereout. 1 Eq. Cas. Abr. 337.

As to the construction of securities for money lent; when courts of equity held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum bona fide advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it; but this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by the court; or he may, when out of possession, be barred, by length of time, by analogy to the statute of limitations. See also, tit. Bond, Mortgage, Penalty.

The form of a trust or second use, gives the courts of equity an exclusive jurisdiction, as to the subject matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction; but the trust is governed by very nearly the same rules as would govern the estate in a court of law, if no trustee was interposed. 1 P. Wms. 645. 668. 669. And by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of common law. See 3 Comm. 436—440.

EQUITY or REDEMPTION, on mortgages. If where money is due on a mortgage, the mortgagee is desirous to bar the equity of redemption, he may oblige the mortgagor either to pay the money, or to be foreclosed of his equity; which is done by proceedings in the court of chancery. But the chancery cannot shorten the time of payment of the mortgage-money, where it is limited by express covenant, though it may lengthen it: and then, upon non-payment, the practice is to foreclose the equity of redemption of the mortgagor. 2 Vern. 364.

To foreclose the equity, a bill in chancery is exhibited; to which an answer is put in, and a decree being obtained, a master in chancery is to certify what is due for principal, interest, and costs, which is to be paid at a time prefixed by the decree, whereupon the premises are to be reconveyed to the mortgagor; or, in default of payment, the mortgagor is ordered to be foreclosed from all equity of
redemption, and to convey the premises absolutely to the mortgagor.

A fine or non-claim will bar equity of redemption: but in a common mortgage, a covenant to restrain it shall not be regarded in chancery. 2 Vent. 355. If the condition of a mortgage is, that the mortgagor only should redeem during life, or that he and the heirs of his body shall do it; yet the general heir shall have the equity of redemption, for if the principal and interest be offered, the land is free. 1 Vern. 90. 190. And it is held, though a bond be conditioned, that if the money be not paid at such a time, then, for a further sum, the mortgagor shall have the land absolutely, as a purchaser, &c. in such case a man may also redeem. Ibid. 488. See at large this Dic. tit. Mortgage.

EQUIVALENT. Commissioners are appointed by statute to examine and state the debts due to Scotland on the union by way of equivalent; and provision is made for payment of the same by a yearly annuity, &c. Stat. 5 Geo. I. c. 20. See tit. Scotland.

EQUUS COOPERTUS, A horse equipped with saddle and furniture. Ing. 16 Edw. I.

ERECTION Of lands into a barony, earldom, &c. See tit. Petra.

ERIACH. By the Irish brachon law, in case of murder, the brachon or judge compounded between the murderer and the friends of the deceased who prosecuted, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompense, which was called an eriach. 4 Comm. 313. See Weregild.

ERMINAGE, or ERMINE, or ERMINAGE STREET, See Waiting Street. ERMINS, from the Fr. ermine.] A fur of great value, much used in rubes of state. See tit. Customs.

ERN. The names of places ending in ern are said to imply a melancholy situation; from the Sax. ern, i.e. locus secretus.

ERNES, The loose scattered ears of corn that are left on the ground, after the binding or cocking of it: it is derived from the old Teutonic Ernde, harvest; ernden, to cut or mow corn: hence to ern, is, in some places, to glean. Kennet's Gloss.

ERRANT, (itinerant.] Is applied to justices of the circuit, and bailiffs at large, &c. See Eyre.

ERRATICUM, A waif, or stray; an erring, or wandering beast. Const. Norman. A. D. 1080.

ERROR. Fr. erreuv.]

Signifies something wrong in pleading or process, &c. whereupon a writ is brought for remedy thereof, called a writ of errors; in Latin, de errore corrigendo.

A writ of error is a commission to judges of a superior court, by which they are authorized to examine the record, upon which a judgment was given in an inferior court; and, on such examination, to affirm or reverse the same, according to law. Jenk. Refp. 25. 2 Inst. 40. Yctw. 202. Hardw. 340. But yet, if, by the writ of error, the plaintiff therein may recover, or be restored to any
thing, it may be released by the name of an action. Co. Litt. 288. b. See post, div. II. V. There is also a writ of error to reverse a fine, and which must be prosecuted within twenty years, by stat. 10 & 11 Wm. III. c. 14. See tit. Fine and Recovery.

A writ of error to some superior court of appeal is the principal method of redress for erroneous judgments in the king's courts of record, having power to hold plea of debt or trespass above 40s. It lies for some supposed mistake in the proceedings of such court; or, to amend errors in a base court, not of record, a writ of false judgment lies. Finch's L. 484. The writ of error only lies upon matter of law, arising on the face of the proceedings; so that no evidence is required to substantiate or support it, there being no method of reversing an error in the determination of facts, but by an attaint or a new trial, to correct the mistakes of the former verdict. See 3 Bro. P. C. 3vo. ed. 513.

Formerly suits were much perplexed by writs of error brought upon very slight and trivial grounds; as misspellings, and other mistakes of the clerks, all which are now effectually helped by the statutes of amendment and jofijias; and particularly by stat. 5 Geo. I. c. 13. it is enacted, that all writs of error, wherein there shall be any variance from the original record, or other defect, may be amended by the court, and made agreeable to the record: and where any verdict hath been given in any action, suit, &c. in any of the courts at Westminster, or other court of record, the judgment thereon shall not be stayed or reversed for any defect or fault in form or substance in any bill, writ, &c. or for variance in any such writs from the declaration and other proceedings; but this statute not to extend to any appeal of felony or process, on indictment, information, and appeal. Such writ of error to be brought and prosecuted with effect within twenty years, by stat. 10 & 11 Wm. III. c. 14. Stat. 16 & 17 Car. II. c. 8. enacts, that in all actions real, personal, or mixt, the death of either party between verdict and judgment shall not be alleged for error. By stat. 25 Geo. III. c. 80. imposing a stamp duty on warrants of attorney, it is provided that no action shall be stayed, nor any judgment, sentence, &c. reversed, by reason of omission or defect in the entering, or filing of record, the memorandum or minute directed. By these and other statutes, all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained, but for some material mistake assigned. See tit. Amendment, Judgment.

If a writ of error be brought to reverse any judgment of an inferior court of record, where the damages are less than 10l. or if it is brought to reverse the judgment of any superior court after verdict, he that brings the writ, or that is plaintiff in error, must (except in some peculiar cases) find substantial bail; to prevent delays by frivolous pretences of appeal; and for securing payment of costs and damages. See tit. Costs. And as to bail in such cases, see stats. 3 Jac. I. c. 3. 13 Car. II. st. 2. c. 2. 16 & 17 Car. II. c. 3. 19 Geo. III. c. 70.

A writ of error lies from the inferior courts of record in England into the king's bench, and not into the common pleas. Finch's L. 460. Dyer, 230. And before stat. 23 Geo. III. c. 28. it lay from the king's bench in Ireland to the king's bench in England. It likewise may be brought from the common pleas at Westminster.
to the king's bench, and then from the king's bench, the cause is removable to the house of lords. From proceedings on the law side of the exchequer, a writ of error lies into the court of exchequer chamber, before the lord chancellor, lord treasurer, and the judges of K. B. and C. P. and from thence it lies to the house of peers. From proceedings in K. B. in debt, detinue, covenant, account, case, ejectment or trespass, originally begun there by bill, (except where the king is a party,) it lies to the exchequer chamber, before the justices of C. P. and barons of the exchequer; and from thence also to the house of lords. Stat. 27 Eliz. c. 8. But where the proceedings in K. B. do not first commence therein by bill, but by original writ sued out of chancery, this takes the case out of the general rule laid down by the statute; so that the writ of error then lies, without any intermediate stage of appeal, directly to the house of lords, the dernier resort for the ultimate decision of every civil action. 1 Roll. Rejs. 264. 1 Sid. 424. 1 Sawnd. 345. Carth. 180. Comb. 295. Each court of appeal, in their respective stages, may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts; but none of them are final, save only the house of peers, to whose judicial decisions all other tribunals must therefore submit, and conform their own. See 3 Comm. 406—411.

In criminal cases also, judgments may be reversed by writ of error, which lies from all inferior criminal jurisdictions to the court of K. B. and from K. B. to the house of peers; it may be brought for notorious mistakes in the judgment or other parts of the record: as where a man is found guilty of perjury, and receives the judgment of felony, or for other less palpable errors, such as any irregularity, omission or want of form, in the process of outlawry or proclamations; the want of a proper addition to the defendant’s name, according to the statute; (see tit. Abatements,) for not properly naming the sheriff, or other officer of the court, or duly describing where his county court was held: for laying an offence committed in the time of the late king, to be done against the peace of the present; and for many other similar causes, which (though allowed out of tenderness to life and liberty) are not much to the credit or advantage of national justice. See tit. Outlawry, Indictment, &c.

These writs of error to reverse judgments in cases of misdemeanors, are not to be allowed of course, but on sufficient probable cause shown to the attorney-general; and then they are understood to be grantable of common right, et ex debito justitiae. But writs of error to reverse attainters in capital cases are allowed only ex gratia, and not without express warrant under the king’s sign manual, or at least by the consent of the attorney-general. 1 Vern. 170. 175. Those therefore can rarely be brought by the party himself, especially where he is attainted for an offence against the state; but they may be brought by his heir or executor after his death. But the easier and more effectual way, is to reverse such attainer by act of parliament. See tit. Attainder, Judgment.

Having said thus much generally, we may now proceed particularly to inquire.
I. 1. By whom, against whom; and, 2. at what Time this Writ may be brought.

II. 1. In what Cases it will lie; and, 2. how it is to be brought.

III. In what Court it is to be brought.

IV. How Errors are to be assigned; and what may be assigned for Error. See ante, II. 1.

V. What Defence may be made by a Defendant in Error.

VI. Of the Judgment to be given on a Writ of Error.

I. 1. Any person dammified by error in record, or that may be supposed to be injured by it, may bring a writ of error to reverse it, whether he be a party or no; but principal and bail cannot join in a writ of error. And where there are several defendants, if one of them release the errors, he may be summoned and severed, and the others may reverse the judgment. 6 Rev. 26. Hob. 72.

Judgment against two, one brought a writ of error, and held it should be quashed with costs; that it could not be amended, and that if the other party would not join, the defendant who chose to bring a writ of error, must proceed by summons and severance.

Hardw. 135, 136.

Defendants having agreed under a consolidation rule not to bring any writ of error, cannot do so, though there be manifest error in the record. 1 H. Black. 21.

No person can reverse a thing for error, unless the error be to his prejudice. 5 Rep. 38. One in remainder may have writ of error upon judgment given against tenant in tail; but he in reversion or remainder shall not have writ of error in the life-time of tenant for life, on judgment given against such tenant, because they cannot be parties grieved in his time. 2 Nits. Abr. 712.

No person can bring a writ of error to reverse a judgment who was not party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reversal thereof. 1 Roll. Abr. 747. Dyer, 90.

So a writ of error does not lie against any but him who is party or privy to the first judgment, his heirs, executors, or administrators. 1 Roll. Abr. 747. Dyer, 90.

And therefore, on a judgment for recovery of land, the writ must be brought against him who was party to the judgment, although he hath nothing in the land, and not against the tenant; and on such writ the judgment may be reversed; but there must go a scire facias against all the tertenants. 1 Roll. Abr. 749. 1 Roll. Rep. 302.

Upon this rule, that none shall have a writ of error to reverse a judgment, but he who is privy to, or hath some prejudice thereby, it has been resolved, that if one hath lands on the part of his mother, and loseth them by erroneous judgment, and dies, the heir of the part of the mother shall have the writ of error. 1 Leon. 261. 2 Sid. 56. See Owen, 68. Godd. 377.

So the younger son, when entitled to the land by the custom of borough english, shall bring the writ of error, and not the heir at common law: for this remedy descends with the land. Owen, 68.

1 Leon. 262. 4 Leon. 5.

So if there be an erroneous judgment in the case of tenant in tail female, the issue female, and not the son, shall bring a writ of error. Dyer, 90. 1 Leon. 261. 1 Roll. Abr. 747.
So if a man settles land to the use of himself and the heirs of his body, the remainder to his own right heirs, and dies, leaving issue only a daughter, who levies a fine, and dies without issue, and J. S. brings a writ of error as cousin and collateral heir of the daughter, yet he shall never reverse the fine; for there could no right descend to him from the daughter, because she had but an estate-tail, which determined by her death without issue; and it does not appear that the remainder in fee was in the daughter as right heir, wherefore J. S. shall not reverse the fine, quia de non apparentibus et non existentibus eadem est ratio, especially in a court of judicature, where the judges can take notice of nothing that does not come judicially before them, and appear in the pleading. Dyer, 89. Cro. Eliz. 459. 3 Lev. 36.

If there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, though they themselves can have nothing; and this is said to be necessary only by way of conformity. 1 Roll. Abr. 747. Dyer, 89.

But if tenant for life, and he in remainder in fee (being an infant) join in a fine, the infant alone may bring error for the error in respect of the person of the infant, which is the cause of the action for him, and for no other. 1 Leon. 31. Cro. Eliz. 115.

A writ of error may be brought by him that is made party by the law, though he was not originally party to the suit, as he who comes in as a voucher. 1 Roll. Abr. 748. 755.

If a man is indicted for felony, and thereupon a capias and exigent are awarded, but he dies before attainder, his administrators may have error upon this award of the exigent, because by the award of the exigent, his goods were forfeited; and this is ad gravem damnum, &c. though the principal judgment can never be given. 11 Co. 41. b.

Writ of error lies in B. R. to reverse a fine levied in the common pleas, and to cancel the same if it be erroneous: and if there be not an original, or not proper writs of covenant, or if there be any fraud, &c. writ of error may be brought to make the fine void. Co. Litt. 9. See tit. Fine and Recovery.

2. It was formerly held that a writ of error could not be brought before the judgment given; and if it bore teste before, it was no supersedeas, for the words of the writ are, si judicium reddiat sit, &c. 1 Roll. Abr. 749. But it seems now agreed, that a writ of error that bears teste before the judgment is good; and this is the usual course for preventing and superseding execution; but the judgment must be given before the return of the writ. March, 140. 1 Vent. 255. Moor, 461. 3 Ker. 308. 1 Vent. 96. Latch. 133. and see 1 Term Rep. 279. and New Rep. C. P. i. 298.

But a writ of error, that bears teste before any plaint entered, is not good. March, 140.

So where the defendant, upon an indictment of barraty, brought a writ of error, bearing teste before the assize: it was disallowed, because, if such practice should obtain, it would disappoint all proceedings there. 1 Vent. 255. 3 Ker. 308.

The allowance of a writ of error may be served before the plaintiff is entitled to sign final judgment. 2 Bos. & Pull, 137. But the allowance of the writ of error, previous to the judgment being signed, is an irregularity permitted for the convenience of
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the party; for the judgment in the action is the true foundation of the writ of error. 2 Bos. & Pull. 479.

The court of K. B. will not infer that a writ of error was sued out for delay, because it was sued out before final judgment signed. And though it should be made returnable before final judgment, it will still operate as a supersedeas upon the judgment, which, when signed in the same term, relates back to the first day thereof. 5 East's Rep. 145.

A writ of error cannot be brought after twenty years. Hardw. 343. The statute of limitations must be pleaded to a writ of error, as well as to an original action. Id. 346. See Limitation of Actions, Recovery.

II. 1. Writ of error will not lie in the exchequer-chamber on judgment in replevin in B. R. nor on judgment in action of scadatum magnatum. 2 Nels. 708, 709. But on judgment in replevin in C. B. there may be writ of error brought in B. R. The stat. 27 Eliz. c. 8. (see post, div. III.) is only to relieve on the merits of the cause, as it stood on the first judgment.

Error de recordo quad coram nobis residet lies in the court of B. R. for errors in fact in the judgment of the same court; as non-age of the parties, want of an original, &c. which doth not proceed from the error of the judges; and this writ is allowed without bail. Cro. Jac. 254. And errors in fact may be corrected in C. B. the same term, without this writ, which lies not in the exchequer-chamber. Ibid. 620.

If judgment is given in B. R. in civil actions, a writ of error will not lie in the same court, only for errors in fact triable by a jury; but upon a judgment in criminal cases, error will lie in B. R. whether the error be in fact or in law; though it lies also in parliament. 3 Salt. 147.

Where a judgment in C. B. is affirmed upon a writ of error in B. R. and afterwards a scire facias is brought on that judgment, and the plaintiff hath judgment thereon, no writ of error lieth in the exchequer-chamber, because the record was not in B. R. by bill, but by writ of error. 1 Roll. Refs. 264. 3 Salt. 148. See 1 Salt. 263.

Writ of error cannot be brought on any record which is not a judgment. 1 Salt. 145. Nor upon an interlocutory judgment. 6 East's Refs. 333.

The court of B. R. having allowed the sufficiency of a return to a writ of mandamus, and therefore refused to grant a peremptory writ, the party applying brought his writ of error in parliament. Held that no writ of error lay in this case, it being merely an award of the court, and not a strict formal judgment. 3 Bro. P. C. (3vo. ed.) 505.

The court of C. P. have held, that, though writ of error may lie on a judgment of nonsuit, yet the court will, on motion to take out execution, grant it, as such writ of error must be evidently merely for the purpose of delay and vexation. 1 H. Black. Refs. 432.

No writ of error will lie of any judgment that is not given in a court of record; nor of a judgment given in an inferior court, as the county court, &c. Co. Litt. 288. b. Nor of a decree or sentence in chancery proceeding according to equity. 37 Hen. VI.
Bro. Error, 95. 1 Roll. Abr. 744. But of a judgment given in the limited court of chancery, called the petty bag; which proceeds according to the common law, and holds plea of stire facias for repeal of the king's letters patent, &c. a writ of error lies in B. R. 1 Roll. Abr. 744. Dyer, 315. 4 Inst. 80. Plowd. 393.  

Error lies for variance between the original writ and declaration, or want of an original: and where proceedings are so erroneous, as not to be amended; for faults in verdicts, executions, &c. or when any thing material is omitted in a judgment, writ of error lies, and the judgment shall be reversed: so where the styles of inferior courts are wrong, or insufficiently named, &c. their judgments may be reversed. But where faults are small, they sometimes pass as vitium cleric. 2 Nels. Abr. 714, 715, 721. &c. 728.  

By the practice of the court of common pleas, a defendant coming in by a capias uitlagatum the same term in which an exigent is returnable, may avoid the outlawry without a writ of error, by showing that he purchased a supersedesas out of the same court, and delivered it to the sheriff before the quintro exactus, &c. or by showing any other matter apparent on record, which makes the outlawry erroneous, as the want of an original, or the omission of process, or want of form in a writ of proclamation, &c. or a return by a person appearing not to be sheriff, or a variance between the original and exigent, or other process, or the want of such addition as is required by stat. 1 Hen. V. c. 5. 2 Hawk. P. C. 659—661. 1 Roll. Abr. 742, 743. And see stat. 5. Eliz. c. 23, § 13, 14.  

If one be attainted upon an erroneous indictment, he cannot be relieved but by writ of error, for the judgment being quod suspenderat, &c. which is the judgment of law due for the offence, it must be presumed to have been given, for that he was guilty of the offence; but if judgment of acquittal is given upon such indictment, the king need bring no writ of error; but the offender may be newly indicted, for the judgment being quod est sine dit, &c. may be given as well for the insufficiency of the indictment, as for the party's innocence. 3 Inst. 214.  

Also any judgment whatsoever, given by persons who had no good commission to proceed against the person condemned, may be falsified, by showing the special matter, without writ of error, because it is void; as where a commission authorizes to proceed on an indictment taken before A. B. C. and twelve others, and by colour thereof the commissioners proceed on an indictment taken before eight persons only. 1 Inst. 231. 2 Hawk. P. C. 459.  

If one is attainted of felony, and after, by relation of a general pardon, the felony is pardoned, he shall be discharged, for he hath no remedy by writ of error to reverse the attainder. 6 Co. 5. a.  

Wherever a new jurisdiction is erected by act of parliament, and the court or judge, that exercises this jurisdiction, acts as a court or judge of record, according to the course of the common law, a writ of error lies on their judgments; but where they act in a summary method, or in a new course different from the common law, there a writ of error lies not, but a certiorari. 1 Salk. 263. See fit. Certiorari.  

2. Error in the king's bench is thus prosecuted: the curator of the county makes out the writ of error from a praecipe, or copy of the declaration left with him; which is to be allowed with the clerk of the errors, and a certificate of the allowance of the writ
must be served on the attorney of the defendant in error. The proceedings are by scire facias ad audiendum errores against the plaintiff in the action, wherein judgment was obtained; and the writ of error being received by the sheriff to whom directed, he is to give notice to the plaintiff in error to show cause why execution should not be on the judgment, and make a return to that purpose; then a rule is to be given with the clerk of the rules, for the plaintiff in error to assign his errors by such a day, which, if he shall not do before the rule is out, the plaintiff in the original action may take out execution against him.

Two things are requisite to make a writ of error a supersedeas of execution; viz. the allowance, (i.e. the delivery of the writ to the clerk of the errors,) and putting in bail. If the writ of error be allowed before judgment, the time for putting in bail, four days, runs from the judgment; if after judgment, from the time of the allowance. 1 Bos. &c. Pull. 478.

If the plaintiff in error assign errors in the record, then the defendant must plead in nullo est erratum, and thereupon enter the cause with the clerk of the papers for the errors to be argued; and paper books for the counsel and judges are to be made out, &c. If some part of the record be not returned, a certiorari must be prayed to bring it into court; and if matters of fact are alleged in error, as nonage, death of the plaintiff, &c. a proper plea must be made thereto, and issue thereupon taken and tried, as is in any other issue: but if only matters of law are assigned, the errors are argued by counsel on both sides, and the judgment is either reversed or affirmed: and when judgment is affirmed, the defendant in error may proceed against the defendant in the action, by taking out execution on the affirmetur, or bringing action of debt on the judgment; or he may prosecute the bail by scire facias upon their recognisance. But it is said by some, that an assignment of errors in fact and in law, is bad on demurrer: by others, that the assignment of error in law may stand, and the fact be considered as nothing. Sed quare, Where there is an error in fact, if the writ of error ought not to be coram vobis residentis, i.e. in the court where the judgment was given. In this case, however, we must except the want of warrants of attorney, &c. which are facts; and it is every day's practice to assign such, with errors in law; and the usual course is, if defendant in error does not pray a certiorari, for the plaintiff to pray it.

When a judgment is reversed or affirmed in the exchequer chamber, the transcript of the record thereof will be remitted back to the court of K.B. to be entered up at the end of the judgment there; and if such judgment shall be affirmed in the exchequer-chamber, yet a writ of error may be brought thereupon returnable in parliament.

If you would bring a writ of error in parliament to reverse a judgment in B. R. there must be a petition to the king for his warrant, which petition has the allowance of the attorney-general, and then the king writes on the top of it fiat justitia; whereupon a writ of error is made out by the clerk of the errors. And then the lord chief justice of B. R. carries the record, and a transcript thereof, up to the house of lords in full parliament, and after they are examined there, leaves the transcript with the lords,
but brings back the record: and this being done, the attorney for
the defendant in error gets some lord to move that the plaintiff
in error may assign his errors; but if for the plaintiff, motion is
to be made, that upon his assigning errors the defendant may
appear and make his defence, and counsel be heard on both sides;
then, after the judgment is either affirmed or reversed, the clerk
of the parliament remands the transcript of the record into B. R.
with the affirmation or reversal thereof, to be entered upon the re-
cord of the said court, which court, if affirmed, awards execution,

A writ of error in parliament is made returnable immediately;
or on a prorogation to the next session, and it doth not determine
by a prorogation. But if a parliament is dissolved before the
errors are heard, it is otherwise. And on motion, execution hath
been granted in B. R. on a judgment in such a case, the record
being never out of the court. Raym. 5. 2 Nits. Abr. 731.

Where a writ of error was brought in B. R. in the life-time of
Geo. I. but was not argued till after the accession of Geo. II. when
the judgment was affirmed, on a writ of error in parliament, this
judgment was reversed; it being held that the first writ of error,
the king being sole plaintiff in the cause, was absolutely abated. This
was the case of the deanery of Armagh, in Ireland. 3 Bro. P. C.
(8vo. ed.) 507.

The party bringing the writ of error is to cause the roll where
the judgment is entered, to be marked with the word error in the
margin, that the other party may have notice on the record that the
writ of error is brought, and this marking of the roll, on giving
notice thereof, is as it were a supersedeas in itself to hinder ex-
cution: though a supersedeas is to be made out, allowed, and left
with the sheriff of the county; and the plaintiff’s attorney is not
obliged to search the record, whether writ of error is brought or
not; but may make out execution upon the judgment, if no super-
sedeas be taken forth, or he hath no notice of the writ of error.
Trin. 24 Car. B. R.

On a writ of error of a judgment in the common pleas, or other
inferior court, in every adversary suit, the record itself shall be
removed, that it may remain as a precedent and evidence of the
law in the like cases. 1 Roll. Abr. 753. 5 Co. 39.

But in the case of a fine the transcript only is removed, for fines
are only a more solemn acknowledgment or contract of the par-
ties, and therefore are no memorials of the law, and need only be
affirmed or vacated; if the former, the contract stands as it was;
if the latter, the justices of B. R. may send for the fine itself,
and reverse it, or they may send a writ to the treasurer and
chamberlain to take it off the file; besides, should the record it-
self be removed and affirmed, it could not be engrossed for want
of a chirographer in B. R. 1 Roll. Abr. 752. 1 Bentil. 51. Dyer,
of Lands, Recovery.

If the judges of the common pleas, or other judges upon a writ
of error, will not certify all the record, the party that sues the
writ of error may allege diminution of the record, and pray a writ
to the justices that certified the record before, to certify the whole
record. Fitz. N. B. 25 a. But diminution cannot be al-
leged upon a writ of error brought upon a judgment in any inferior court. 1 Sd. 40. Yet see infra.

By stats. 3 Jac. I. c. 8. 13 Car. II. st. 2. c. 2. 16 & 17 Car. II. c. 8. § 3. he that brings writ of error, to reverse a judgment in a superior court, in all cases after a verdict, or in any action of debt, upon bond for payment of money only, or on a contract, must put in good sureties to prosecute his writ of error with effect, and pay the debt and damages if judgment be affirmed: and by stat. 19 Geo. III. c. 70. § 5. this is extended to writs of error to reverse judgments in inferior courts where the damages are under 10l. if bail be not put in, on the writ of error brought upon a judgment in the courts at Westminster, in those cases where bail is required, the writ of error is no supersedeas to the execution; though such writ is in being, until a nulla prosequi is entered, or judgment affirmed, &c. And it is the same where insufficient bail is given, on rule to put in better bail, or justify those put in, which if the plaintiff does not do, execution is ordered upon the judgment, with a non obstante to the writ of error, &c. Mich. 9 Wm. III. B. R. See further, ut. Supersedeas.

A plaintiff in error is, in the time appointed by the rule for that purpose, to certify the record into B. R. or the court will grant a nulla prosequi on the writ of error. Mich. 22 Car. B. R. See foot, div. V.

The court will not let the plaintiff in error quash his own writ of error; though they may grant leave to discontinue it. 5 Mod. 67. If a verdict is for a defendant in error,and judgment is affirmed, costs are allowed by stat. 3 Hen. VII. c. 16. on occasion of the delay of execution. And by stat. 4 & 5 Ann. c. 16. upon quashing writs of error, for defect or variance from the record, &c. the defendant is to have costs as if judgment were affirmed. When a writ of error is not in delay of execution, as where it is brought after the execution is executed, the plaintiff shall not have damages and costs. Crs. Jac. 536.

When a writ of error is brought to reverse a judgment in an inferior court, though the record is not certified as it ought, yet execution cannot be sued; but on certificate of the neglect, &c. a writ of execution of the judgment may be issued. 1 Litt. Abr. 326. Upon a writ of error, if the clerk below will certify the record wrong, action on the case lies against him; and if he make no return, the plaintiff may have the writ of execution out of chancery. Mod. Cas. 245.

If erroneous judgment be for the defendant in an inferior court, and it is reversed in B. R. and the merits appear for the plaintiff, he shall have judgment; but if the merits be against the plaintiff, the defendant shall have new judgment, in like manner as in the exchequer-chamber; for the judges are to reform, as well as to affirm or reverse. 7 Mod. 2, 3. If a writ of error to reverse a judgment be discontinued for want of prosecution, execution cannot be had upon the judgment, until the discontinuance is certified from the court where discontinued. 1 Litt. 518. If a writ of error is brought to remove a record of a judgment given in C. B. and the plaintiff in error leaves the record there, without removing it before the return of the writ; or in case there be a longer return day than is convenient in the writ of error, as if it is pur-
chased the beginning of Michaelmas term, and made returnable in Hilary term; the court may award execution, although the writ of error be delivered. Jenk. Cent. 180. Dyer, 245.

III. Erroneous judgments given in the court of B. R. were only reformed by the parliament till stat. 27 Eliz. cap. 8. By that statute, a writ of error lies out of the chancery upon all judgments given in the king's bench, when the suit is by bill, (except the king is a party to the suit,) returnable in the exchequer-chamber, before the judges of the common pleas, and barons of the exchequer, &c. who may examine the errors, and reverse or affirm the judgment; other than for errors, concerning the jurisdiction of the court, or want of form in writs, pleadings, &c. and after the errors are examined, and judgment affirmed or reversed, the record is sent back to the king's bench, to proceed and award execution; but if the suit is by original writ, or on qui tam, &c. where the king is party, writ of error lies only in parliament.

A qui tam action of debt is a civil suit. Comp. 382. And a writ of error on it lies from the king's bench to the exchequer-chamber. Doug. 353. See tit. Exchequer.

Not only on reversing or affirming a judgment, the exchequer-chamber is to send back the record into B. R. but also if the plaintiff in the writ of error is nonsuit, or if the suit is discontinued in the court of exchequer-chamber, the record shall be sent back; and the court of exchequer shall give costs and damages to the plaintiff in the original action for his delay, &c. though if the plaintiff in error was plaintiff in the original action, there no costs can be given. 2 And. 122. 2 Nels. Abr. 707.

Where a writ of error determines in the exchequer-chamber by abatement or discontinuance, the judgment is not again in B. R. till a remittitur is entered. 1 Salk. 261. The exchequer-chamber doth not award a sci. fac. ad audiend. errores; but notice is given to the parties concerned. 1 Vent. 34.

The court of parliament is the supreme court, where, anciently, causes of great consequence, as between the magnates regni, were heard and determined; hence the dernier resort is to the house of lords, to which a writ of error lies; and therefore, if a writ of error be brought of a judgment in the king's bench into the exchequer-chamber, and there the judgment is reversed; yet a writ of error lies of such judgment into parliament, and the lords may reverse such second judgment. Show. Parl. Cas. 24. 110. 1 Vent. 334. Reym. 330. 2 Jan. 99. 2 Lev. 232.

So a writ of error lies into parliament upon a judgment in B. R. either in a cause brought there by writ of error, or originally commenced there. 1 Roll. Abr. 745.

And though upon a judgment in the king's bench, since the stat. 27 Eliz. cap. 8. the party may elect either to bring a writ of error in the exchequer-chamber, or in parliament; yet if the cause commenced in the king's bench by original writ, there lies no writ of error but into parliament; also if he elects to bring error in the exchequer-chamber regularly, he cannot after bring error in parliament upon the first judgment. 1 Saw. 516. Carth. 180. 5. P. See 2 Roll. Abr. 492. 2 Lev. 232.

To reverse a judgment given in the court of common pleas, the
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Writ of error is made returnable in the king's bench, and error is not to be brought in parliament; though where a writ of error is brought in B. R. upon a judgment given in C. B. and the judgment is reversed or affirmed in B. R. the party griev ed may have writ of error returnable in parliament. Stat. 31 Edw. III. cap. 12.

No writ of error lies in banco or banco regis, upon a judgment given within the five ports; but by custom such judgment is exam inable by bill, in nature of a writ of error, coram domino custode seu gardiano quinque portuum ejus dem de Shefway. 4 Inst. 224. See tit. Cinque Ports.

If a judgment be given in the court of stannaries of the duchy of Cornwall, no writ of error lies upon this in banco or banco regis, because it hath not been used; but of this there may be an appeal to the guardian of the stannaries, and from him to the prince; and when there is no prince, to the king's privy council. 1 Roll. Abr. 746. See 4 Inst. 230. 2 Darw. Abr. 304.

Upon a judgment given in the hustings in London, a writ of error lies at St. Martin's, before certain justices. 1 Roll. Abr. 745. 1 Lev. 309. 2 Smed. 253. S. P. And upon a judgment of the said justices, a writ of error lies in parliament. See 2 Leon. 107. See tit. Dissenters.

In Wales, at the great sessions, there a writ of error lay on personal actions to the council of the marches of Wales; and if they gave an erroneous judgment, it was final; for stat. 34 & 35 Hen. VIII. c. 16. ordained this writ to the council there; and no writ of error was granted of such erroneous judgment: upon errors in real or mixed actions, however, in Wales, writ of error lay into the king's bench. Jenk. Cent. 71. And so now it does in personal actions by stat. 1 W. & M. c. 27. See tit. Courts of Wales.

In some cases a writ of error lies in the same court wherein the record is.

If upon a judgment in B. R. there be error in the process, or through the default of the clerks, it shall be reversed in the same court by writ of error sued there before the same justices. Fitz, N. B. 21. Po/fh. 181. 1 Roll. Abr. 746.

So if one is indicted of treason or felony in B. R. or being indicted elsewhere, the indictment is removed in B. R. and by process of that court be is erroneously outlawed, and so returned; a writ of error may be brought in B. R. for the reversal thereof. 3 Inst. 214.

Also if an erroneous judgment in point of law be given in B. R. upon an indictment in London, a writ of error may be brought in the same court; for though in civil cases error does not lie in the same court, unless for a matter of fact; yet in criminal cases it lies as well for an error in law as fact. 1 Sid. 208.

But if an erroneous judgment be given, and the error lies in the judgment itself, and not in the process, a writ of error does not lie in B. R. of such judgment. 1 Roll. Abr. 746.

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If a record is removed by writ of error out of the common pleas into the king's bench, and the writ of error for insufficiency is quashed in the king's bench, the plaintiff in error may have a writ coram volis residenti. But such new writ is not a supersedeas in itself as the first writ was, and therefore he must move the court for a supersedeas, and put in bail thereon. *Carth.* 368, 369.

So if such second writ be quashed for insufficiency, yet the court will grant a new or second writ of error coram volis residenti. As also a supersedeas on putting in bail; for such second writ being void, is as if there had been none before. *Carth.* 369, 370.

IV. The parties, upon the removal of the record by the writ of error, have no day in court given to either of them; so that if the plaintiff in error delay to sue forth his *sci. fac. ad audiend. errores*, the defendant hath no way to compel him, but by suing out a *scire facias quare executionem non* &c. And if thereupon the plaintiff in error doth not plead that his *errores* are assigned, but suffer judgment to pass upon two writs, no errors afterwards assigned shall prevent execution. *Carth.* 41. *The sci. facad. audiendum errores* is only used in *B. R.* In the exchequer chamber notice is given. It is said the usual practice is, that the defendant in the writ of error, by consent, doth voluntarily take notice of the assignment of errors; and this consent is testified by his pleading *in nullo est erratum*, and then there is no occasion for a *scire facias ad audiendum errores*. *Ibid.*

**Errors** are to be assigned in the term, or the writ of error will be quashed. *1 Litt. Abr.* 534. When the record is in court by writ of error, the plaintiff in error is to assign his *errores*; and may have a *scire facias* before the record is entered: and the manner of assigning *errores*, according to the ancient practice, is to put a bill into court, and say in the bill, *in hoc erratum est* &c. showing in certain in what things. *Fitz. N.B.* 20. The assignment of error, *in omnibus erratum*, is not good; for the judgment is founded upon the original writ, count, pleading, issue, process, trial, and so is manifold. *Jenk. Cent.* 34. *Errors in law*, not assigned in the record, may be assigned after a *scire facias ad audiendum errores*; as the record is in the court; but it is not so of a warrant of attorney, which is an error in fact, and not upon record. *Ibid.* 140. *5 Rep.* 37.

If one in execution brings *error*, he ought to assign the *errores* in his proper person: and in cases of outlawry for felony, *errores* sufficient must be certainly alleged in writing, before the writ of error is allowed. *Jenk. Cent.* 165, 179. Where a recovery is had, and *error* brought, if the original writ doth not abate by death; but is abatable only, as by entry into the land pending the writ, or coverture, acquisition of a dignity, a partial array returned, aid denied, &c. that should have been pleaded, and were not: these shall not be assigned for *error*; for they are waived. *9 Rep.* 47. *21 Hen.* VI. 29.

The assigning general *errores* is to say that the declaration, &c. is not sufficient in law; and that judgment was given for the plaintiff where it ought to have been for the defendant: and the *errores* of a judgment are now to be assigned on the record, to appear with it to the court.
If the plaintiff in error assigns errors in fact, and errors in law, which are not assignable together, and the defendant in error pleads in nullo est erratum; this is a confession of the error in fact, and the judgment must be reversed, for he should have demurred for the duplicity. Stry. 69. 1 Lev. 76. Salk. 258. 6 Mod. 113. 296.

Also if an error in fact be well assigned, in nullo est erratum is a confession of it, for the defendant ought to have joined issue upon it, so as to have it tried by the country. 1 Sid. 93. Raym. 39. Because, in nullo est erratum is in the nature of a demurrer, which confesses the fact, if well pleaded, or well assigned.

But if an error in fact be ill assigned, in nullo est erratum is no confession of it; as if it be assigned, that such a one at the time of the return of the venire was not sheriff, and the record be removed into B. R. by certiorari, there in nullo est erratum is no confession of that error, because the record is not in court, that being no part of the record, for the plea is in nullo est erratum in recordo. Cro. Jac. 12. 29. 521. Raym. 231. Cro. Car. 421. 1 Roll. Abr. 758.

So if the plaintiff in error assigns an error in fact, viz. that the defendant, who was an infant, did not appear by guardian, but by attorney, and concludes with hoc paratus est verificare, instead of concluding to the country, as he ought to do, though the defendant in error pleads in nullo est erratum, yet it shall not amount to a confession, but shall be taken only for a demurrer. Yelv. 58.

Also if an error in fact, that is not assignable, be assigned, and in nullo est erratum be pleaded, it is no confession; as if it be assigned, that such a day there was no court of common pleas sitting, because that is against the record, and in such case in nullo est erratum is only a demurrer; so if a man says he did not appear, and the record says he did, in nullo est erratum is no confession, but a demurrer, because it is against the record. Cro. Car. 12. 29. 52. Yelv. 58. Raym. 231. 1 Venl. 252. 3 Keb. 259. 1 Lev. 76.

It has been held that an error in fact cannot be assigned in the exchequer-chamber; though, by some authorities, errors in fact may be assigned as errors in law. 2 Mod. 194. 2 Nels. Abr. 708.

By stat. 20 Car. II. c. 6. in actions real, personal and mixed, the death of either party between verdict and judgment shall not be alleged for error.

It seems a general rule, that nothing can be assigned for error that contradicts the record; for the records of the courts of justice being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it. 1 Roll. Abr. 757.

An original writ of the same term, in which final judgment is given, will not warrant that judgment, if it appear upon the same record that there have been proceedings of a preceding term. 1 Wils. 181.

Hence it is, that in a writ of error to reverse a fine, the plaintiff
cannot assign, that the *consor died before the teste of the dedimus*, because that contradicts the record of the *consor* taken by the commissioners, which evidently shows that the *consor* was then alive, because they took his *consor* after they were armed with the commission, and the *dedimus* issued. *Dyer*, 89. 1 *Roll. Abr.* 757. See tit. *Fine and Recovery.*

V. The defendant in error may plead a release of all errors, or a release of all suits, and these pleas, if found for him, will for ever bar the plaintiff in error. 1 *Roll. Abr.* 788.

So where by a writ of error the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions real or personal is no bar. *Co. Litt.* 238. b. 8 *Co. 152.* 1 *Roll. Abr.* 788. 2 *Roll. Abr.* 405.

Also if a man loses in a real action, and he releases all his right to the land, and so where there is a fine levied, this shall bar him of his writ of *error*; for no person can bring a writ of *error* to reverse a judgment that is not entitled to the land, &c. for the courts of law will not turn out the present tenant, unless the defendant can make out a clear title; possession always carrying with it the presumption of a good title, till the right owner appear. *Roll. Abr.* 747. 788. *Dyer*, 50 a. 3 *Leon.* 36. *Cro. Eliz.* 469. 1 *Roll. Abr.* 789. If the tenant, pleading a *practic* against him, aliens in fee, and after judgment is given against him, and he brings a writ of *error*; this *practic* is not any bar to the writ, because he was privy to the judgment after. 1 *Roll. Abr.* 788. *Bridg.* 77. 1 *Roll. Rep.* 306. In a writ of *error* to reverse a common recovery, it is no good plea that the plaintiff, pleading the writ of *error*, hath entered into part, for before the possession was taken from him, he might have *error* to reverse the judgment, though not to have restitution. 1 *Lev.* 72. See tit. *Fine and Recovery.*

In a *sc. fac.* against a tenant, he may plead a release of *error*, though he be not privy to the judgment. 9 *Hen. VI.* 48. *Bro.* 9. *S. C.*

But the tenants cannot plead in abatement of the writ of *error*, but only in bar, as a release, &c: in maintenance of their title. 1 *Lev.* 72.

After in *nullo est errorum* pleaded, the party affirms the record to be perfect, and he is foreclosed to say there is *error* in it: though the court is not restrained from examining into it. 1 *Salk.* 276. The judges are not bound to search for *errors* in the record, which were not assigned; but may if they will; and if they find *error* they ought to reverse the judgment. *Jenk. Cont.* 159.

VI. A judgment, *as being an entire thing*, cannot be reversed in part, and stand good as to other part; or be reversed as to one party, and remain good against the rest; though if there be *error* in awarding execution, the execution only shall be reversed, and not the judgment. *Hob.* 90. *Curt.* 235. If judgment is entered against joint-defendants, when one of them is dead, the judgment shall be reversed for *error* as to all of them; for in such case
the plaintiff ought to make a special entry of the death of the party, with nilit ulterius versus eum fiat, and then take judgment only against the others. *Ibid.* 149.

The court of exchequer-chamber have not any authority, but to reverse or affirm the judgment, &c. for they cannot make execution. *Cro. Eliz.* 103. But where judgment is given for the defendant, and the plaintiff brings a writ of error; if the judgment is reversed, the court which reverses the judgment shall give judgment for the plaintiff, as the other court ought to have done. *Yelt.* 117, 118.

When a record is removed into K. B. from a county-palatine court by a writ of error, and that writ is non-prossed, the court of C. B. will award execution. 3 *Term Rep.* K. B. 657.

Where judgment for the defendant on a special verdict is reversed in the exchequer-chamber, that court, on motion, will give a final judgment for the plaintiff: 1 *Bos. & Pull.* 30.

In the exchequer-chamber, after reversal of a judgment, &c. in B. R. the court gave judgment that the plaintiff recover, &c. but because they wanted power to award a writ of inquiry, which was necessary, being on a demurrer, therefore it was sent back into B. R. for the execution of that writ, and thereupon to give final judgment: but if the judgment is against the plaintiff in B. R. upon a special verdict, and that judgment is reversed in the exchequer-chamber, there being no writ of inquiry requisite, the court of exchequer-chamber doth not only give judgment of reversal, but a complete judgment for the plaintiff in the action. *Carth.* 181.

The court of exchequer-chamber is bound to allow double costs to the defendant in error, on the affirmation of a judgment of K. B. 2 *H. Black.* 284. But interest is in their discretion. *Id.* and 2 *Bos. & Pull.* 219. That court will allow interest to a defendant in error under stat. 3 *Hen. VII.* c. 10. on a judgment of non-pross, as well as on a judgment of affirmation. Such interest is not allowed at the rate of 3½ per cent. instead of 4½ per cent. as formerly. 1 *Bos. & Pull.* 29.

If erroneous judgment be had by consent of parties, it may be reversed in the exchequer-chamber; for consent of parties may not change the law; but if the consent is entered upon and made part of the record, it may be good. *Hob.* 5. *Cro. Eliz.* 664. The reversal in the exchequer-chamber is res judicata: no writ of error lies upon such judgment, except in parliament; and it is by six judges at least, by *stats.* 27 *Eliz.* c. 8. 31 *Eliz.* c. 1.

When judgment is given in B. R. for the plaintiff in error, there shall be only a judicium revocetur, &c. entered with costs: if for the defendant in error, that the plaintiff nil capitat per breve suum de errore. The chief justice of B. R. &c. or the eldest judge, ought to allow a writ of error, which is in judgment of law a supercedas until the errors are examined, and the judgment affirmed or reversed. *Cro. Jac.* 534. As a plaintiff having erroneous judgment may reverse it, and new judgment may be given for him; so if a judgment is reversed, the plaintiff may bring a new action for the same cause. 1 *Lex.* 310. Where a judgment is pleaded in bar of another action, &c. and judgment given on that plea; writ of error may be had to reverse the second judgment. *Cro. Eliz.* 503. *Jenk. Cent.* 259. And debt lies upon a judgment in B. R.
after a writ of error brought, which is only a supersedeas to the
eexecution. 1 Lev. 153. But the court will stay proceedings in
such action on giving judgment.
In a writ of error upon a judgment in trespass against several,
if the judgment be erroneous, because one of the defendants was
within age, and appeared by attorney, the judgment shall be re-
Aiten, 14, 75. Sty. 121. 125. 406.
If judgment be given for the plaintiff on one count in a decla-
ration, and a distinct judgment for the defendant on another, and
the defendant bring a writ of error to reverse the judgment on the
first count, the court of error cannot examine the legality of the
judgment on the second count, no error being assigned on that part
of the record. 6 Term Rep. K. B. 200.
See further, as to the proceedings on a writ of error, Impey's
Pract. K. B.
ERTHMIOTUM, An ancient word for a meeting of the neigh-
bourhood to compromise differences among themselves; it is men-
ESBRANCATURA, from the Fr. esbrancher.] Cutting off
branches or boughs in forests, &c. Hoved. 784.
ESCALDARE; To scald : escaldare porcos, was one of our an-
cient tenures in serjeanty; as appears by the inquisition of the ser-
jeancies and knights' fees in the twelfth and thirteenth year of
King John, within the counties of Essex and Hertford. Lib. Rub.
Secar. MS. 137.
ESCAMBIO, derived from the Span. cambier, to change.] Was
a license granted to make over bills of exchange to another beyond
the sea: for by the stat. 5 Rich. II. c. 2, no merchant ought to ex-
change or return money beyond sea without the king's license.

ESCAPE.
ESCAPIUM, from the Fr. eschaper, i.e. effugere, to fly from.] A
violent or privy evasion out of some lawful restraint; as where a
man is arrested or imprisoned, and gets away before he is de-
ivered by due course of law. Staunaf. P. C. cap. 26, 27. Terms
de Ley.
Escapes are either (A) in civil, or (B) in criminal, cases.

(A) As to Escapes in Civil Cases.
I. 1. Where the party shall be said to be legally committed, so
that the suffering him to go at large will be adjudged an Escape;
2. What Degree of Liberty, or going at large, shall be deemed
an Escape; 3. What Persons are answerable for an Escape.
II. Of the Difference between voluntary and negligent Escapes;
and Escapes on Meseke Process and Execution.
III. 1. Of the nature of the Action to be brought for an Escape;
and 2. Of the Manner of laying it.
IV. Of the Party's Defence sued for the Escape; and therein of
pleading Fresh Suit.
I. 1. It seems agreed as a general rule, that wherever a sheriff or other officer hath a person in custody, by virtue of an authority from a court which hath jurisdiction over the matter, that the suffering such a person to go at large is an escape, for he cannot judge of the validity of the process or other proceedings of such court, and therefore cannot take advantage of any errors in them; hence the law allows him, in an action of false imprisonment, to plead such authority, which will excuse him, though it be erroneous; but if the court has no jurisdiction of the matter, then all is void, and consequently the officer not punishable for suffering a person taken upon such void authority to escape. *Moor*, 274. *Dyer*, 66. 175. 306. *Poth. 203*. 1 *Leoz. 36*. 5 *Co. 54*. 8 *Co. 141*. b. *Cro. Jac.* 280. 289. 2 *Bulst. 64*. 237. 256. If a *ca. sa.* issue after a year and a day, without suing out a *scire facias*, this error will not excuse the sheriff in an escape. *Cro. Car.* 288. *Saik.* 273. But though a sheriff may not take advantage of an erroneous process, yet he shall if a void process, on which it is no escape to let a prisoner go.

If at the petition of *A.* and the rest of the creditors of *B.* a commission under the statutes against bankrupts is issued out against *B.* and thereupon the commissioners sit and offer interrogatories to *C.* and he refuses to be examined, and by them is thereupon committed to prison, and the gaoler suffers him to escape, as the commissioners had sufficient authority to commit, and *A.* was prejudiced by the escape, he may maintain an action against the gaoler. 1 *Roff. Ref. 47*. *Moor*, 834. pl. 1123. 8. C.

The sheriff cannot be charged with an escape before he had the party in *actual* custody by a legal authority; and therefore if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. *Bro. Escape*, 22.

But if *A.* is arrested, and in the *actual* custody of the sheriff, and afterwards another writ is delivered to him at the suit of *J. S.* upon the delivery of the writ, *A.* by construction of law, is immediately in the sheriff's custody, without an actual arrest; and if he escapes, the plaintiff may declare that he was arrested by virtue of the second writ, which is the operation it has by law, and not according to the fact. 5 *Co. 89*. But where the sheriff, not having *actually* arrested a defendant, but accepted the undertaking of an attorney to put in bail, who put in bail, and the sheriff had returned a *cepi corpus*, held per Lord Mansfield at Surrey assizes, summer 1775, in *Hodgson and Jekerman*, Esq. that the sheriff was not liable, upon a writ of *non est inventus*, on another process, to an action, either for an escape or a false return, or for negligence in not taking the defendant, no actual negligence being proved; and the plaintiff was nonsuited.

*Note*, the writ returned *cepi corpus* was a *latitat*, returnable three or four days after the other process, which was an original, but that difference was not, in this case, considered as material.

If a person out upon bail renders himself in discharge of his bail, and a *reddidit se* is entered in the judge's book, and a *committo* filed in the office, and the prisoner afterwards escapes; yet if no notice was given to the marshal of such render, nor no entry made of the commitment in his book, the prisoner shall not be
deemed in custody so as to charge the marshal with an escape; but it seems this matter cannot be insisted upon after trial. 1 Saik. 272, 273. Vide post.

It hath been held, that entering a committitur upon the roll was not sufficient to charge the marshal with an escape, without proving an actual imprisonment; but that proving the party to be actually in prison, though there be no entry made in the marshal's book, is sufficient. 1 Sid. 226. 1 Keb. 775.

And now, for the greater security of creditors, and the better to enable them to prove the actual custody of the prisoner, it is enacted, by stat. 8 & 9 Wm. III. c. 27. § 9, that if any one, desiring to charge any person with any action or execution, shall desire to be informed by the marshal or warden, or their respective deputies, or by any other keeper of any other prison, whether such person be a prisoner in his custody, or not, the said marshal or warden, or such other keeper, shall give a true note in writing thereof, to the person so requesting the same, or to his lawful attorney, upon demand at his office for that purpose, or in default thereof, shall forfeit the sum of 50l. and if such marshal or warden, or their respective deputy, &c. exercising the said office, or other keeper, &c. of any other prison, shall give a note in writing that such person is an actual prisoner in his or their custody, every such note shall be taken as a sufficient evidence that such person was at that time a prisoner in actual custody.

A committitur upon the roll is good evidence in escape, without an entry in the marshal's book. Ld. Raym. 705.

2. Every person in prison by process of law is to be kept in salviæ et arcæ custodia, in order to compel them the more speedily to pay their debts, and make satisfaction to their creditors. Plowd. 36. 3 Co. 44. 2 Inst. 381. 1 Roll. Abr. 305.

If therefore a defendant being taken in execution, be afterwards seen at large, for any the shortest time, even before the return of the writ, this is an escape. 2 Bl. Ref. 1048. and see 1 Bos. & Pul. 24. that a defendant so taken in execution cannot be allowed to go about even with an officer.

Persons in the king's bench and fleet prisons are to be actually detained within the said prisons; and if they escape, action of debt lies against the warden, &c. 1 Rich. II. c. 12. But now the marshal or warden grant the liberty of the rules to such as they think proper, (not criminally charged,) on proper security. Keepers of those prisons suffering prisoners, either upon contempt or mesne process, or in execution, to be out of the rules, (except on rule of court, &c.) are guilty of an escape; and persons conniving at an escape shall forfeit 500l. &c. by 8 & 9 Wm. III. c. 27. And by this statute, where any prisoner in execution escapes, the creditor may have any other new execution against him.

If the bailiff of a liberty, who has the return and execution of writs, remove a prisoner taken in execution to the county gaol, situated out of the liberty, and there deliver him into the custody of the sheriff, this is an escape for which an action of debt lies. 2 Term Ref. 5.

By stat. 5 Ann. c. 9. if any person in custody, for not performing any decree in chancery, &c. escape, the party for whom the money is decreed may have the same remedy against the sheriff, as if the
prisoner had been in custody on execution. A prisoner in execution should not be allowed to go out of the gaol; for if he goes out, though he returns again, it is an escape. *3 Ref. 43, 44.* 2 Inst. 360. 381. And yet in London, by special custom there, in some cases the prisoner may go abroad with his keeper, and it will be no escape. *Ibid.* See *Hob. 202.* Where the justice of the court, and plaintiff in the suit, agree that the prisoner shall be at liberty, and he go out and return at his time, it is no escape: but this may not be without the sheriff's consent. *Dyer, 275.*

If a plaintiff by word license the sheriff to deliver the prisoner, no action will lie for this as an escape. *27 Hen. VIII. 24.*

If there be an escape by the plaintiff's consent, when he did not intend it, the law is hard that the debt should be thereby discharged; as where one was in execution in B. R. and some proposals being made to the plaintiff in behalf of the prisoner, seeing there was some likelihood of an accommodation, the plaintiff consented to a meeting in a certain place in London, and desired the prisoner might be there, who came accordingly: this was held to be an escape with the plaintiff's consent, and he could never after be in execution at his suit for the same matter. *2 Mod. 136.*

It hath been adjudged no escape to let a prisoner go where the sheriff hath the prisoner in custody, if it be before the return of the writ: it is sufficient if the officer have the party at the return of the writ, &c. *Moore, 299.* 1 *Salk. 401.* 2 *Nils. 739, 740.* See *frow, II.* Yet it hath been held, that where a *habeas corpus* is granted to bring a person into court, if the sheriff on the way let him go at large in the county, or carry him round about a great way, &c. it will be an escape. *1 Mod. 116.* And an escape in one place is an escape in all places; for a prisoner being once escaped, and at large, it shall be intended he is confined to no place. *1 Litt. Abr. 537.* Committing the marshal of the marshalsea to prison, was held an escape in law of all the prisoners there. See *Sty. 375.*

If a woman, warden of the *Fleet* prison, marries her prisoner, or if a sheriff, &c. marries a woman in execution with him, in either case it will be deemed an escape in law. *Plowd. 17.*

If a man hath judgment against two persons, and both are taken in execution, if the sheriff suffer one of them to escape, he shall be answerable for the whole debt, though he hath one of them still in custody. *1 Roll. Abr. 810.* But in an action on the case, tried before Lord Mansfield, in Surry, for an escape of one of two defendants, under very favourable circumstances for the officer, his lordship left it to the jury whether they would find the whole of plaintiff's debt in damages, or only half, and the jury found only half.

By stat. 8 & 9 *Wm. III.* cap. 27. sect. 8. it is enacted, "that if the marshal or warden for the time being, or their respective deputy or deputies, or other keeper or keepers of any other prison or prisons, shall, after one day's notice in writing given for that purpose, refuse to show any prisoner committed in execution to the creditor at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged to be an escape in law."

3. In *civil actions* the sheriff is to answer for the escape of his bailiff; as the bailiff is for that of his servant: and action on the
case lies against the sheriff for an escape upon mesne process, because the plaintiff is prejudiced in his suit by it. Cro. Eliz. 623. 625. 1 Danv. Abr. 183. See also Cro. Jac. 419. Dyer, 241. See Bull. N. F. 59, 60. Where a person is in custody on mesne process, and being outlawed after judgment at the suit of another, the judgment creditor brings a warrant on a capias utlagatum, and delivers it to the sheriff's officer, who hath him in custody; if the officer afterwards permits the person to escape, though he refuse to execute the warrant, the sheriff is chargeable in action on the case. 5 Rep. 89.

Where one has the custody of a gael of freehold or inheritance, and commits it to another person, who is insufficient, the superior is answerable for all escapes suffered by his inferior; but if the inferior be sufficient, the action should be brought against him, and not against the superior. See 9 Co. 98. 2 Jones, 60. 2 Lev. 158. 1 Vent. 314. 2 Mot. 119. 4 Rep. 98.

Also by stat. 8 & 9 Wm. III. cap. 27. sect. 11. it is enacted, "that the offices of marshal of the king's bench prison and warden of the fleet shall be executed by the several persons to whom the inheritance of the prisons, prison-houses, &c. of the said prisons, or either of them, shall then belong respectively, in his or their respective proper person, &c. or by their sufficient deputies; for which deputies, and for all forfeitures, escapes, and other misdemeanors in their offices by such deputies permitted, &c. the said person in whom the aforesaid inheritances respectively are, shall be answerable; and the profits and inheritances of the said offices shall be sequestrated, &c. to make satisfaction for such forfeitures, escapes, &c. respectively, as if permitted, &c. by the persons themselves, in whom the respective inheritance of the said prisons shall then be."

A prisoner escapes out of the king's bench, or marshalsea, or the fleet; the keeper of the prison out of which he escaped is to be charged with it; but if the escape be from either of the compters, the action must be brought against the sheriffs of London. Dyer, 278. 3 Rep. 52.

Action of escape against the warden of the fleet for an escape upon mesne process: the prisoner returns to the fleet the same day, and the plaintiff afterwards proceeds to final judgment against him, yet the action lies against the warden. 1 Wils. 294. In an escape upon mesne process out of the borough court, brought in B. R. against the bailiff thereof, the defendant shall not take advantage in B. R. of any error in the process below. 1 Wils. 255.

Action of escape will not lie against the executor or administrator of a sheriff, &c. for an escape, because it was personal and mortitur cum persona: but it may be otherwise if there be a judgment recovered against the sheriff before he died. Dyer, 322. See post, III. 2.

If there are two sheriffs of the same place, and an action of escape is brought against them both, if one of them dies, yet the writ shall not abate; for it being in nature of a trespass, and merely personal, the party can only have remedy against the survivor. Cro. Eliz. 625. But the death should be suggested. By stat. 8 & 9 Wm. III. c. 11. sect. 7, the death of one plaintiff or defendant, where the action will survive to, or against the survivor,
shall not abate the suit. But the death must be suggested on the roll. See tit. Abatement.

An old sheriff omits turning over a prisoner in execution to the new sheriff; it is said to be an escape; so where there are two executions against a man, and in the indenture of turning over mention is made but of one, &c. 3 Rep. 71.

II. There are two kinds of escapes; voluntary and negligent: voluntary, is when one arrests another for felony, or other crime, and lets him go by consent; in which case the party that permits the escape is esteemed guilty of the crime committed, and must answer for it: negligent escape, is when one is arrested, and afterwards escapes against the will of him that arrested him, or had him in custody; and is not pursued by fresh suit, and taken again before the party pursuing hath lost sight of him. Crom. Just. 36. And for these negligent escapes, the gaoler, &c. is to be fined. One negligent escape will not amount to a forfeiture of a gaoler's office, as one voluntary one will: but many negligent escapes will do it: and the fine for suffering a negligent escape of a person attainted, was by the common law of course 100l. and in other cases at the discretion of the court. 3 Lev. 288. 2 Lev. 81. See post, as to escapes in criminal cases.

If any prisoner escapes who was in execution, his creditors may retake him by capi. ad satisfac. or bring action of debt on the judgment, or a seire facias against him, &c. 1 Vent. 269. 3 Salk. 160. If a man escapes, with the consent of the gaoler in a civil case, he cannot retake him. 3 Rep. 32. 52. 1 Sid. 330. But the plaintiff may retake him at any time. Stat. 8 & 9 Wm. III. c. 27.

If the plaintiff permit the prisoner to escape, he cannot afterwards retake him; and if the body and goods, &c. of a conusor are taken in execution upon a statute merchant, if the conusor agree that he shall go at large, it is a discharge of the whole execution, and the conusor shall have his lands again: it is otherwise if the sheriff had permitted him to escape, the execution on the lands would not be discharged. 2 Nels. Abr. 737.

A difference is to be observed between permissive and negligent escapes, with respect to the sheriff; for if a sheriff suffer a prisoner voluntarily to go at large, the sheriff cannot retake him even upon fresh suit; and if he does, the prisoner may have an action of trespass against him. Carter, 212.

An escape from the rules of the king's bench prison, without the marshal's knowledge, is not a voluntary escape. 2 Term Rep. 126.

If the marshal of the king's bench, or warden of the Fleet, or any other who hath the keeping of prisons in fee, suffer a voluntary escape, it is a forfeiture of the office. 3 Mod. 146. Carter, 212. And there is likewise a farther penalty of 500l. added by 8 & 9 Wm. III. c. 27. above mentioned.

B., being in custody at the suit of A., in a joint action against B. and C., B. justifies bail in an action entitled by mistake A. v. B. and a rule so entitled is served on the marshal of K. B. who thereupon discharges B. out of custody; he not being charged in custody in any more than one action at the suit of A. the court of K. B. held that the marshal was liable in an action for an escape. 5 East's Rep. 292.
There is this difference between an escape on mesne process and execution: if the sheriff arrest a person on mesne process, and he is rescued by J. S. he may return the rescue, and such return is good, and no action of escape lies against him after such return; but the court will issue process against such rescuer, or fine him; for in this case, though the sheriff may, yet he is not obliged to raise the posse comitatus. 1 Roll. Abr. 807. 1 Jones, 207. 1 Roll. Ref. 388. 3 Lev. 46. But after judgment on a capias ad satisfaciendum, the sheriff cannot return a rescue, for in such case the sheriff is obliged to raise the posse comitatus, if needful, and therefore, if he return a rescue; an action of escape lies, or a new capias; for the return of an ineffectual execution is as none. 1 Roll. Abr. 807. Cro. Cor. 240. 245. 3 Co. 42. See N. P. 59, 60, and 6 Rep. 51. Cro. Eliz. 868. and this Dici. ut. Rescue.

If a sheriff having arrested a defendant on mesne process, keep him in his custody after the return of the writ, and then carry him to prison, he is not liable to an action on the case as for an escape; if the jury find that the plaintiff has not been delayed or prejudiced in his suit. 5 Term. Ref. K. B. 37.

III. 1. At common law the plaintiff had no remedy against the sheriff for an escape, whether upon mesne process or in execution, but by special action upon the case. 2 Inst. 382. 1 Show. 176. 2 Saund. 34. Hard. 30.

But now, by an equitable construction of Westm. 2. 13 Edw. 1. cap. 11. action of debt is given against the sheriff; and see 2 H. Black. 108. and by stat. 1 Rich. II. cap. 12. against the warden of the fleet, (which extends to all gaolers and keepers of prisons, though infants or feme coverts, 2 Inst. 382.) for escapes in execution.

The plaintiff, at his election, may maintain either an action upon the case, or debt, for an escape in execution. Cro. Jac. 351. 533. 619. Cro. Eliz. 877. Dyer, 278 b. See 1 Jones, 144. 1 Sid. 364. S. C.

If a prisoner in custody upon a capias utlagatum is suffered to escape, the plaintiff may either maintain an action qui tam against the sheriff, or bring an action of debt against him in his own right. Cro. Jac. 351. 533. 619. Cro. Eliz. 877.

An action of escape is not a local action, and therefore if one escape out of the marshalsea, which is in Surry, the action may be laid in Middlesex. Dyer, 278 b. See 1 Jones, 144. 1 Sid. 364. S. C.

It is usual now, on an escape on mesne process, to declare against the sheriff, &c. in case: on execution, in debt.

The distinction seems now to be thus settled. If a sheriff or gaoler suffers a prisoner, who is taken upon mesne process, to escape, he is liable to an action on the case. Cro. Eliz. 625. Comb. 69. But if, after judgment, a gaoler or sheriff permits a debtor to escape, who is charged in execution for a certain sum; the debt immediately becomes his own, and he is compellable by action of debt, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand. 2 Inst. 382.

In debt against the sheriff or gaoler for an escape, the jury cannot give a less sum than a creditor would have recovered against the prisoner, viz. the sum endorsed on the writ, and the legal fees of execution. 2 Term Ref. 126.
2. In this action it is not necessary to set forth all the formalities required by law in other cases. 

Therefore, if upon a judgment obtained by the testator, the executor brings a scire facias, and has judgment, whereupon a capias ad satisfacendum issues, and B. is arrested, and suffered to escape, the plaintiff in an action against the sheriff for this escape, may declare briefly upon the judgment in the scire facias, without showing the gradual proceedings at length, as is usually done in an action of debt upon a judgment. 


So if a defendant is arrested on a special capias, founded on an original returnable in B. R. in action for his escape, it is not necessary to set forth the original.

If the plaintiff declares that he sued out a writ of execution against J. S. without setting forth any judgment, and that the defendant suffered him to escape; this is an incurable fault; for by this means he lost the benefit of pleading nulli dies record, which he might do if the plaintiff had set forth the judgment. 

If A. recovers against B. as executor, and has him in execution, and the sheriff suffers him to escape, the action must be brought as executor in the detinet only, and not in the debet and detinet. 

If the plaintiff declares, that the prisoner was committed, and escaped, but does not say prout habet per recordum; yet, upon a general demurrer, this shall be good; for the gist of the action was the escape, and the commitment only inducement. 

If in escape the plaintiff declares, that he had J. S. and his wife in execution, and that the defendant suffered them to escape, and the jury find specially that the husband only was taken in execution, (it being for a debt due from the wife before coverture,) and that he escaped; this is sufficient, and the plaintiff shall have judgment; for the substance of the issue is found, though not pursuant to the declaration. 

So in an action on the case for the escape of A. where the jury found that A. was taken by J. S. the former sheriff, and not by the defendant, the present sheriff; but finding that he was legally in his custody, and that he suffered him to escape, the plaintiff had judgment. 

An administratrix may maintain an action in her own name against the marshal for the escape of a prisoner in execution on a judgment obtained by her as administratrix. 

Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape; and the defendant may plead a retaking on a fresh pursuit to such count without traversing the voluntary escape. 

In debt for an escape against the sheriff, the endorsement of non est inventus on the ca. ca. is sufficient evidence of its having been delivered to him. But a legal arrest must be proved in such action.
ESCAPE (A) IV.

By the stat. 8 & 9 Wm. III. cap. 27. sect. 12. it is enacted, "that it shall be lawful for any person having cause of action against the warden of the fleet prison, upon bill filed in the courts of common pleas or exchequer against the warden, and a rule being given to plead thereto, to be out eight days at most after filing such bill, to sign judgment against the warden, unless he plead to the bill within three days after such rule is out."

IV. If the prison takes fire, by means whereof the prisoners escape, this shall excuse the sheriff, and he may well plead it. 1 Roll. Abr. 808.

So if the prison is broke by the king's enemies, this shall excuse the sheriff, for he can have no remedy over against them. 4 Co. 14. 1 Roll. Abr. 808.

But if the prison was broke by rebels and traitors, the king's subjects, this shall not excuse him, for he may have his remedy over against these. Ibid.

In an action of debt against a gaoler for the escape of a prisoner in execution, (which action will lie though the escape were without the knowledge or fault of the gaoler,) in such case the gaoler can avail himself of nothing but the act of God or the king's enemies as an excuse. 2 H. Black. 163.

When a prisoner tortiously escapes from the custody of the gaoler, he may be retaken; and the sheriff, &c. may pursue a person escaping into that or any other county; and if he retakes the prisoner on fresh pursuit before action brought, it shall excuse the sheriff, for there the prisoner shall be said to be in execution still. 3 Rep. 44. Cro. Jac. 657. 1 Jones, 144. 1 Roll. Abr. 808. And where the sheriff is to answer the debt and damages for such escape, he shall have his counter-remedy against the party escaping, and may take him at any time and place, and imprison him till he hath satisfied the sheriff as much as he hath paid to the plaintiff; or he may bring an action upon the case against the prisoner, and so relieve himself. 5 Rep. 52. Cro. Eliz. 393.

It was formerly held that the sheriff, &c. might give fresh pursuit in evidence, and need not have pleaded it. See 1 Mod. 116, 1 Sid. 13.

But now, by stat. 8 & 9 Wm. III. cap. 27. sect. 6. it is enacted, "that no retaking on fresh pursuit shall be given in evidence, unless the same be specially pleaded; nor shall any special plea be allowed, unless oath be first made in writing by the defendant, and filed in the proper office of the respective courts, that the prisoner, for whose escape such action is brought, did, without his consent, privy, or knowledge, make such escape; and if such affidavit shall at any time afterwards appear to be false, and the defendant shall be convicted thereof by due course of law, he shall forfeit the sum of 500l."

See tit. Sheriff.

A voluntary return of a prisoner, after an escape, before action brought, is equivalent to a retaking on a fresh pursuit; but it must be pleaded. 2 Term Rep. 125.

Plea, that if the prisoner escaped several times (without specifying them) he returned as often, is bad. 1 Boc. & Pull. 413.
ESCAPE (B) I, 2.

(B) Escapes in Criminal Cases.

[See 37 Geo. III. c. 140. § 6. by which the laws touching escape of felons under sentence of death, are applied to offenders under sentence of a naval court-martial, if allowed the benefit of a conditional pardon.]

I. 1. What shall be deemed an Escape; 2. Where it shall be adjudged Voluntary, and where Negligent.

II. Where the Prisoner may be retaken after an Escape, and where the Escape is excused by such a retaking; or by Killing the Prisoner if he cannot be retaken.

III. 1. How the Officer suffering an Escape is to be indicted; and, 2. How the escape is to be tried and adjudged.

IV. Of the Punishment of 1. Voluntary, and, 2. Negligent Escapes; and, 3. Of Persons aiding and assisting Prisoners to attempt their Escape.

I. 1. A man must be committed to prison by lawful mittimus; or breach of prison and escaping is not felony. If a party is committed for treason, to break prison and escape is but felony; but if a prisoner let out traitors, it will be treason. H. P. C. 169. 2 Inst. 390. Where one is imprisoned for petty larceny, or killing a man se defendendo, &c. to break prison and escape is not felony; and if a person be set on fire, not by the privity of the prisoner, he may break prison for the safety of his life. 2 Inst. 390. A gaoler refusing to receive a person arrested by the constable for felony, whereby he is let go, is guilty of an escape; but there must be an actual arrest; which arrest must be justifiable to make an escape; for if it be for a supposed crime, where no crime was committed, and the party is neither indicted nor appealed, &c. it is no escape to suffer a person to go at large. Fitz. Coron. 224. Bro. Esca. 27, 28. If a private person arrest another for suspicion of felony, he is to deliver him to a public officer, who ought to have the custody of him; for if he let him go, it will be an escape. 2 Hawk. P. C. c. 19. And if no officer will receive him, he is to deliver him to the township where arrested, or get him bailed.

A. a mere private man, knows B. to have committed felony, and thenceupon arrests him; he is lawfully in custody of A. until he be discharged, by delivering him to a constable or common gaol; and therefore if he voluntarily suffers such person to escape, though he were no officer, nor B. indicted, it is felony in A. But it is otherwise if he never takes him, nor attempts it, and lets him go. 1 Hale’s Hist. P. C. 594. Justices of peace in their sessions are empowered to inquire of escapes of persons arrested, and imprisoned for felony. Stat. 1 Rich. III. c. 3.

2. There can be no doubt, but that wherever an officer, who hath the custody of a prisoner charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him either from his trial or execution, he is guilty of a voluntary escape, and thereby involved in the guilt of the same crime of which the prisoner was guilty and stood charged with. And it seems to be the opinion of Sir Matthew Hale, that in some cases an officer may be adjudged guilty of such escape, who hath
not such intent, but only means to give his prisoner that liberty
which, by the law, he hath no colour of right to give him.

Thus, to bail a person not bailable by law is a negligent escape. 
*Plews.* 476. And it is said that the crime is equal in a justice of
peace, for taking a felon out of prison without bail, or suffering
him to go at large without commitment, &c. where the offender
confesseth the felony, as it is in the case of a gaoler's permitting
an escape. *Dall.* 382.

If the gaoler so closely pursue the prisoner, who flies from him,
that he retake him without losing sight of him, the law looks on
the prisoner so far in his power all the time, as not to adjudge
such a flight to amount at all to an escape; but if the gaoler once
lose sight of the prisoner, and afterwards retake him, he seems,
in strictness, to be guilty of an escape; and *a fortiori,* therefore, if
he kill him in the pursuit, he is in like manner guilty, though he
never lost sight of him, and could not otherwise take him, not
only because the king loses the benefit he might have had from
the attander of the prisoner, by the forfeiture of his goods, &c.
but also because the public justice is not so well satisfied by the
killing him in such an extrajudicial manner. 2 *Hawk.* P. C. c. 19.

See *post,* div. II.

II. It seems to be clearly agreed by all the books that an officer
making a fresh pursuit after a prisoner, who hath escaped through
his negligence, may retake him at any time after, whether he find
him in the same or in a different county. And it is said generally
in some books, that an officer who hath negligently suffered a
prisoner to escape, may retake him wherever he finds him, with-
out mentioning any fresh pursuit; and, indeed, since the liberty
gained by the prisoner is wholly owing to his own wrong, there seems
to be no reason he should take any manner of advantage from it.
But where a gaoler hath *voluntarily* suffered a prisoner to escape,
it is said by some that he can no more justify the retaking him,
than if he had never had him in custody before, because by his
own free consent he hath admitted, that he hath nothing to do
with him.

Wherever a prisoner, by the negligence of his keeper, gets
so far out of his power that the keeper loses sight of him, the
keeper is liable at the discretion of the court, notwithstanding he
retook him immediately after; for it seems agreed, that this is to
be adjudged a negligent escape, which implies an offence, and
consequently that it must be punishable. It is true, indeed, that
in an action against a gaoler for suffering one arrested in a civil
action to escape, it is a good excuse for the gaoler, that, before
the action brought, he took the prisoner upon *fresh suit,* which is
well maintained by showing that he pursued him immediately after
notice of the escape, though it were some hours after it, and re-
took him; but it does not from hence follow, that the like excuse
will serve for the negligent escape of a *criminal,* because this is
an offence against the public, but the other is only a private da-
mage to the party: neither will it be a hardship to the officer to be
exposed to such punishment as the court, in discretion, shall think
fit to impose upon him for the negligent escape of a *criminal,* as
it would be to be liable to an action of escape, for suffering a per-
son in his custody, in a civil action, to escape; for that in the for-
mer case the court would moderate his fine according to the cir-
cumstances of the whole matter, and would certainly mitigate, if
not wholly excuse it, if he should appear to have taken all reason-
able care: but in the other case, if he should be liable to an ac-
tion, his judgment would not lie in the discretion of the court,
but he would be bound to pay the whole debt for which the party
was in custody, if the escape should be adjudged against him.
However, it is certain, that it will be no advantage to a gaoler to
retake his prisoner after he has been fined for the escape, as is
shown in the precedent section of Hawk. P. C. also it is clear
that he cannot excuse himself by killing a prisoner in the pursuit,
though he could not possibly retake him; but must, in such case,
be contented to submit to such fine as his negligence shall appear
to deserve. 2 Hawk. P. C. c. 19.

III. 1. The indictment must expressly show, that the party was
actually in the defendant’s custody for a crime, action, or commit-
ment for it; and that it is not sufficient to say that he was in the
defendant’s custody, and charged with such a crime; for that a
person in custody may be so charged, and yet not be in custody
by reason of such charge: and it seems also, that every such in-
dictment must expressly show that the prisoner went at large.
Also it seems necessary to show the time when the offence was
committed, for which the party was in custody, not only that it
may appear that it was prior to the escape, but also that it was
subsequent to the last general pardon. Also it seems clear, that
every indictment for a voluntary escape must allege that the de-
fendant fœnus est voluntatì A. B. ad largum ire permìsit; and
must also show the species of the crime for which the party was
imprisoned; for it is not sufficient to say in general, that he was
in custody for felony, &c.

The crime of the prisoner escaping, for which the gaoler is an-
swerable, must be such as it was at the time of the escape; as
where a person is committed for dangerously wounding another,
it is trespass only, and not felony, till the party wounded is dead:
and he who suffers another to escape, who was in custody for
felony, cannot be arraigned for such escape as for felony, until the
principal is attained, but he may be indicted and tried for mispriso-
 before the attainder of the principal. And in high treason it is
said the escape is immediately punishable, whether the party es-
scaping be ever convicted or not. 2 Hawk. P. C. c. 19. See post,
IV. 1.

2. Where persons, being present in a court of record, are com-
mited to prison by such court, the keeper of the gaol is bound to
have them always ready, whenever the court shall demand them
of him; and if he shall fail to produce them at such demand, the
court will adjudge him guilty of an escape, without any further
inquiry, unless he have some reasonable matter to allege in his
excuse; as that the prison was set on fire, or broken open by en-
emies, &c. for he shall be concluded, by the record of the commit-
m ent, to deny that the prisoners were in his custody. 2 Hawk.
P. C. c. 19.
As to other prisoners who are not so committed, but are in the custody of a gaoler, sheriff, constable, or other person, by any other means whatsoever, it seems agreed, that the person who has them in custody is in no case punishable for their escape, except in some special cases, until it be presented; for by stat. W estm. 1. c. 3. it is enacted, that "nothing be demanded nor taken, nor levied by the sheriff, nor by any other, for the escape of a thief or felon, until it be judged for an escape by the justices in eyre; and that he who does otherwise, shall restore to him or them that have paid it, as much as he or they have taken or received, and as much also unto the king."

It hath been adjudged, that this statute restrains not the court of king's bench from receiving such presentments; for that its jurisdiction includes in it that of justices in eyre, and this court is itself the highest court of eyre. 2 Hawk. P. C. c. 19.

It is further enacted by stat. 31 Edw. III. c. 14. "that the escape of thieves and felons, and the chattels of felons and of fugitives, and also escapes of clerks convicts, out of their ordinary's prison, from thenceforth to be judged before any of the king's justices, shall be levied from time to time, as they shall fall, as well of the time past as time to come." By which it seems to be implied, that other justices, as well as those in eyre, may take cognisance of escapes; and it is certain, that justices of gaol delivery may punish justices of peace for a negligent escape, in admitting persons to bail, who are not bailable. 2 Hawk. P. C. c. 19.

And it is farther enacted, by stat. 1 Rich. III. cap. 3. "that justices of peace shall have authority to inquire, in their sessions, of all manner of escapes of every person arrested and imprisoned for felony."

Wherever an escape is finable, the presentment of it is traversable; but where the offence is americable only, there the presentment is of itself conclusive; such amercessments being reckoned among those minima de quibus non curat lex; and this distinction seems to be well warranted by the old books. 2 Hawk. P. C. c. 19.

IV. 1. A voluntary escape amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass; and whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed; and whether he were attained, or only accused of such crime, and neither indicted nor appealed: and it is said to be no excuse of such escape, that the prisoner had been acquitted on an indictment of death, and only committed till the year and day be passed, to give the widow or heir of the deceased an opportunity of bringing their appeal. 1 Hawk. P. C. c. 19.

But the officer cannot be thus punished till the original delinquent hath actually received judgment, or been attained upon verdict, confession, or outlawry of the crime for which he was so committed or arrested: otherwise it might happen that the officer might be punished for treason or felony, and the person arrested and escaping might be acquitted of the charge against him. But,
before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor. 1 Hale's P. C. 588, 589. 2 Hawk. P. C. c. 19.

Also such an escape, suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be punishable in the same manner as if he were never so rightfully entitled to such custody; for that the crime is in both cases of the very same ill consequence to the public; and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason, but because he is a wrongful one. 2 Hawk. P. C. c. 19.

Also if the warrant of a commitment do plainly and expressly charge the party with treason or felony, but in some other respect be not strictly formal, yet it seems that it may be probably argued, that the gaoler suffering an escape is as much punishable, as if the warrant were perfectly right. 2 Hawk. P. C. c. 19.

None shall suffer capitally for the crime of another; so that a principal gaoler is only liable for a voluntary escape suffered by his deputy. 2 Hawk. P. C. c. 19.

2. Whoever de facto occupies the office of gaoler is liable to answer for a negligent escape; and it is no way material whether his title to the office be legal or not. 2 Hawk. P. C. c. 19. A sheriff is as much liable to answer for an escape suffered by his bailiff, as if he had actually suffered it himself, and the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him; but if the gaoler who suffers an escape, have an estate for life or years in the office, it is not agreed how far he in reversion is liable to be punished. 2 Hawk. P. C. c. 19.

Wherever a person is found guilty upon an indictment, or presentment, of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum to be paid to the king, which seems most properly to be called a fine.

It hath been holden, that a negligent escape may be pardoned by the king before it happens, but that a voluntary one cannot so be pardoned. 2 Hawk. P. C. c. 19.

And it seems by the common law, the penalty for suffering the negligent escape of a person attainted, was of course 100l. and for suffering such escape of a person indicted, and not attainted, was 5l. but if the person escaping were neither attainted nor indicted, it seems that it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper; and if the party had twice escaped, it seems that the penalties above mentioned were of course to be doubled; yet it seems that the forfeiture was to be no greater for suffering a prisoner, committed on two several accusations, to escape, than if he had been committed but on one. 2 Hawk. P. C. c. 19.

As to the manner offences of this kind are punishable by statute, it is recited by stat. 5 Edw. III. c. 8, "that persons indicted of felonies in times past, had removed the indictments before the king, and there yielded themselves, and by the marshals of the king's bench had been incontinently let to bail, and after had done many evil deeds," &c. And thereupon it is enacted, "that if any such prisoner be wan-
dering out of prison, by bail, or without bail, and that he be found at the king's suit, or at the suit of the party, the marshal which shall be found thereof guilty, shall have half a year's imprisonment, and be ransomed at the king's will; and the justices shall thereof make inquiry when they see time; and as to the marshals, it shall be done within the verge that which reason will. And in case that the marshals suffer, by their assent, such prisoners to escape, they shall be at law, as before the time of the statute they had been. And the king intendeth not by this statute to lose the escape, where he ought to have the same."

Also it is enacted by stat 10 Hen. VII. c. 10. 4 that every sheriff have the custody of the king's common gaols during the time of his office, except all gaols whereof any person or persons have the keeping of estate of inheritance. And that all letters patent made for term of life, or years, of the keeping of the said gaols, &c. shall be annulled and void. 5 The penalties for escapes inflicted by the subsequent part of this statute are expired.

3. By stat. 16 Geo. II. c. 31. it is enacted, that persons who any ways assist a prisoner, committed for treason or felony, to attempt his escape from any gaol, shall be adjudged guilty of felony and be transported; and if the prisoner be committed for petit larceny, or other inferior offence, or upon process for 100l. debt, &c. the offenders are liable to fine and imprisonment. And where any person conveys any arms, instrument, or disguise, to a prisoner in gaol for felony, &c. or for his use, without the privity of the gaoler, in order to an escape, though no escape be actually made, it is likewise felony and transportation. Also if one assist any prisoner to escape from any constable, or other officer or person in whose custody he is, by virtue of a warrant of commitment for felony, it is declared to be the like offence.

See also stat. 6 Geo. I. c. 23. § 5. 24 Geo. III. c. 56. where to assist felons convict to make their escape from the persons to whom they are delivered to be transported, is felony without clergy. See 3 P. Wms. 439.

The indictment on the above stat. 16 Geo. II. c. 31. must state that the instruments were conveyed to the prisoner with a design to effectuate his escape. But no indictment can be maintained on this statute for contributing to the escape of a prisoner committed on suspicion only. See Leach's Hawk. P. C. ii. c. 21. § 11.

By stats. 44. Geo. III. c. 92. and 45 Geo. III. c. 92. to render more easy the apprehending and bringing to trial offenders escaping from one part of the united kingdom to the other, and also from one county to the other, it is enacted, that offenders escaping from Ireland into Great Britain may be apprehended and conveyed to Ireland; and that offenders escaping from Great Britain to Ireland may be apprehended and conveyed back in like manner. See this Dict. tit. Ireland. By the said act 44 Geo. III. c. 92. offenders escaping with stolen goods from one part to another of the united kingdom, may be tried in the place where the goods shall be found in their custody, and receivers in the place where they receive.

By the stats. 13 Geo. III. c. 51. 44 Geo. III. c. 92. and 45 Geo. III. c. 92. persons committing offences in one county may be pursued and apprehended in any other county. See tit. Justices, Ireland.
See further, relative to this subject of assisting prisoners to escape, this Dict. tit. Rescue; and 2 Hawk. P. C. c. 21.

See further, as connected with the general subject of escape, tit. Geoil III. Rescue.

ESCAPE-WARRANT. If any person committed or charged in custody in the king's bench or fleet prison, in execution, or on mesne process, &c. go at large; on oath thereof before a judge of the court where the action was brought, an escape-warrant shall be granted, directed to all sheriffs, &c. throughout England, to retake the prisoner, and commit him to goal where taken; there to remain till the debt is satisfied: and a person may be taken on a Sunday upon an escape-warrant. Stat. 1 Ann. c. 6. And the judges of the respective courts may grant warrants, upon oath to be made before persons commissioned by them to take affidavits in the country; (such oath being first filed,) as they might do upon oath made before themselves. 5 Ann. c. 9.

A sheriff ought not to receive a person taken on escape-warrant, &c. from any but an officer; not from the rabble, &c. which is illegal. 3 Salk. 149. A person being arrested and carried to Newgate by virtue of an escape-warrant, moved to be discharged, because he said he was abroad by a day-rule when taken; but it appearing by affidavit that he was taken upon the escape-warrant before the court of B. R sat that morning, they refused to set him at liberty. 2 Lord Raym. 927.

ESCAPIO QUITUS. He that by charter is quietus de escapio, is delivered from that punishment which, by the laws of the forest, lieth upon those whose beasts are found within the land where forbidden. Crompt. Jurid. 196.

ESCAPIUM, Hath been used for what comes by chance or accident. Cowel.


ESCHEAT; esceata: from the old French esceait, to fall, or happen. The casual descent, in the nature of forfeiture, of lands and tenements within his manor, to a lord; either on failure of issue of the tenant dying seised, or on account of the felony of such tenant. See this Dict. tit. Tenure II. 7.

Blackstone defines it "an obstruction of the course of descent, and consequent determination of the tenure, by some unforeseen contingency, in which case the land naturally results back, by a kind of reversion, to the original grantor, or lord of the fee." 2 Comm. cap. 15.

Escheats are frequently divided into those propter delictum sanguinis, and those propter delictum tenentis; but both species may be included under the first denomination; since he that is attainted suffers an extinction of his blood, as well as he that dies without relations. See Pleta, lib. 5. c. 1.

Inheritable blood is wanting; 1. When the tenant dies without any relations on the part of any of his ancestors; 2. When he dies without any relations on the part of those ancestors from whom his estate descended; 3. When he dies without any relations of the whole blood; 4. When he is attainted for treason or felony. In all these cases the lands escheat to the lord. See tit. Descent, Attainder. Bastards, and Aliens cannot inherit.
Great care must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. But in fact, escheat operates in subordination to this more ancient and superior law of forfeiture. 2 Inst. 64. Salk. 85. See tit. Forfeiture, Tenure.

The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant by the commission of any felony, (under which denomination all treasons were formerly comprised, 3 Inst. 15. st. 25 Edw. III. c. 3. § 12.) is corrupted and stained, and the original donation of the feud is thereby determined. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage; in case of treason, for ever; in case of other felony, for only a year and a day. 2 Inst. 36. See tit. Tenure II. 7.

It has been held, that a saving against the corruption of blood in a statute concerning felony, doth by consequence save the land to the heir; so as not to escheat; because the escheat to the lord for felony is only pro defectu tenentis, occasioned by the corruption of blood: but it hath been adjudged, that a saving against the corruption of blood, in a statute concerning treason, doth not save the land to the heir: for in treason the land goes to the king by way of immediate forfeiture. 3 Inst. 47. 1 Salk. 85.

Inheritances of things not lying in tenure, as of rents, commons, &c. cannot escheat to the lord, because there is no tenure; nor descend, by reason the blood is corrupted: though they are forfeited to the king by an attainder of treason, and the profits of them shall be also forfeited to the king on attainder of felony, during the life of the offender: and after his death it is said the inheritance shall be extinguished. 2 Hawk. P. C. c. 49. which see.

In cases of escheat, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all that he has at the time of his offence committed shall escheat from him, but also that he shall be incapable of inheriting anything for the future. This farther illustrates the distinction between forfeiture and escheat. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies; the land shall escheat to the lord, because the son, by the corruption of his blood is incapable to be heir, and there can be no other heir during his life; but nothing shall be forfeited to the king; for the son never had any interest in the lands to forfeit. Co. Litt. 13.

In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat.

As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood; here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the
ESCHEATOR. 431

king for a year and a day, and so long after as the offender lives.
3 Inst. 47. See tit. Attainder, Forfeiture.

Husband and wife, tenants in special tail; the husband is attainted of treason and executed, leaving issue; on the death of the wife, the lands shall escheat, because the issue in tail ought to make his conveyance by father and mother, and from the father he cannot by reason of the attainder. Dyer, 322. If tenant in fee-simple is attainted of treason, and executed, upon his death the fee is vested in the king, without office found; yet he must bring a seire facias against the tennants; lands shall never escheat to a lord of whom they are holden, until office found. 3 Rep. 10.

Escheat seldom happens to the lord for want of an heir to an estate; but when it doth, before the lord enters, the homage jury of the lord's court ought to present it. 2 Inst. 26. Land shall escheat to the lord where heirs are born after attainder of felony. 3 Rep. 40. Though if the king pardon a felon before conviction, the lord shall not have his lands by escheat; for the lord hath no title before attainder. Owen, 87. 2 Nis. Abr. 744. If, on appeal of death or other felony, process is awarded against the party, and pending the process he conveyeth away the land, and after is outlawed, the conveyance is good to defeat the lord of his escheat: but if where a person is indicted of felony, pending the process against him, he conveys away his land, and afterwards is outlawed, the conveyance shall not prevent the lord of his escheat. Co. Litt. 13. See further, this Dict. tit. Attainder, Corruption of Blood, Forfeiture.

As a consequence of this doctrine of escheat, all lands of inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the stat. 1 Edw. VI. c. 12. and still, by stat. 5 & 6 Edw. VI. c. 11, the wife of one attainted of high treason shall not be endowed. See tit. Dower.

There is one single instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by the escheat; which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. See tit. Corporation.

It has been decided that where estatul que trust dies without heirs, the trust does not escheat to the crown, so that the lands may be recovered in a court of equity by the king; but that the trustee shall hold them for his own benefit. Burgess v. Wheate, 1 Black. Rep. 123.

ESCHEATOR, escuator.] Was an officer appointed by the lord treasurer, &c. in every county, to make inquests of titles by escheat; which inquests were to be taken by good and lawful men of the county, empannelled by the sheriff. Stats. 14 Edw. III. c. 8. 34 Edw. III. c. 15. 3 Hen. VI. c. 16. These escheatours found offices after the death of the king's tenants, who held by knight-service, or otherwise of the king; and certified their inquisitions into the exchequer; and Fitzherbert called them officers of record. Fitz. N. B. 100. No escheator could continue in his office above one year; and whereas, before the statute of
Westm. 1. c. 24. escheators, sheriffs, &c, would seise into the king's hands the freehold of the subjects, and thereby disseise them; by this act it is provided that no seisure can be made of lands or tenements into the king's hands before office found. 2 Inst. 206. And no lands can be granted before the king's title is found by inquisition. Stat. 18 Henry VI. c. 5. The office of escheator is an ancient office, and was formerly of great use to the crown; but having its chief dependence on the court of wards, which is taken away by act of parliament, it is now in a manner out of date. 4 Inst. 225. There was anciently an officer called escheator of the Jews. Claus. 4 Edw. I. m. 7.


ESCHIPARE. To build or equip. Du Cange. See Eskipparamentum.

ESCROW, A deed delivered to a third person, to be the deed of the party making it, upon a future condition, when a certain thing is performed; and then it is to be delivered to the party to whom made. It is to be delivered to a stranger, mentioning the condition; and has relation to the first delivery. 2 Roll. Aor. 25. 26. Co. Litt. 31. A delivery as an escrow signifies, in fact, as a scrawl or writing, which is not to take effect as a deed till the condition be performed. Co. Litt. 36. See tit. Deed III. 7.

ESCUAGE, See tit. Tenure II. 8.

ESCURARE, To scour or cleanse. Chart. Aniqua.

ESGLISE, Fr. A church: in the old books a division containing the law relative to advowsons, churchwardens, &c. L. Fr. Dict.

ESSINGAE, The Kings of Kent, so called from the first king Ethelbert.

ESKETORES, from the Fr. escher.] Robbers or destroyers of other men's lands and fortunes. Plac. Paris. 20 Edw. 1.


ESKIPPESON, Shipping or passage by sea. Humphrey Earl of Bucks, in a deed dated 13 Feb. 22 Hen. VI. covenants with Sir Philip Chetwind, his lieutenant of the castle of Calais, to give him allowance for his soldiers, skippeson and reskippeson, viz. passage and repassage by ship.

ESLISORS, See Elisore.

ESNECY, ae necia, dignitas primogeniti.] A private prerogative allowed to the eldest coparcener, where an estate is descended to daughters for want of heir male, to choose first after the inheritance is divided. Plcta. Lib. 5. c. 10. Jus ae necia is jus primogeniture, in which sense it may be extended to the eldest son, and his issue, holding first: In the statute of Marlbridge, cap. 9. it is called, initia iurs hereditatis. Co. Litt. 166. See tit. Election.

ESPERONS, Spurs, escleron de or, gilt spurs. 7 Co. Reh. 15.

ESPLEES, expletio, from expleio.] The products which ground or land yield; as the hay of the meadows, the herbage of the pasture, corn of the arable; rent and services, &c. And of an advowson, the taking of tithes in gross by the parson; of wood, the felling of wood; of an orchard, the fruits growing there; of a mill, the taking of toll, &c. These and such like issues are termed esplies. And it is observed, that in a writ of right of land, advowson, &c. the demandant ought to allege in his count, that he or his ancestors took the esplies of the thing in demand; otherwise the pleading will not be good. Terms de Ley. Sometimes this word hath been applied to the farm, or lands, &c. themselves. Plac. Parl. 30 Edw. I.

ESPOUSALS, sponsalia.] Are a contract or mutual promise between a man and a woman to marry each other; and where marriages may be consummated, espossals go before them. Marriage or matrimony is said to be an esposal de presente; and a conjunction of man and woman in a constant society. Wood’s Inst. 57. See tit. Marriage.

ESQUIRE, from the Fr. escu and the Lat. scutum, in Greek skutos, which signifies a hide of which shields were anciently made, and afterwards covered.] An esquire was originally he who attending a knight in the time of war, did carry his shield, whence he was called escuier in French, and scutifer or armiger (i. e. armour-bearer) in Latin.

Hotman saith, that those whom the French call esquires, were a military kind of vassals, having juss scuti, viz. liberty to bear a shield, and in it the ensigns of their family, in token of their gentility or dignity: but this addition hath not now for a long time had any relation to the office or employment of the person to whom it hath been attributed, as to carrying of arms, &c. but has been merely a title of dignity, and next in degree to a knight.

A sheriff of a county being a superior officer, retains the title of esquire during his life, in respect of the great trust he has in the commonwealth. The chief of some ancient families are esquires by prescription. Blount.

Esquires and gentlemen are confounded together by Sir Edward Coke. 2 Inst. 688. He there observes, that every esquire is a gentleman, and a gentleman is defined to be one qui arma gerit, who bears coat armour; the grant of which adds gentility to a man’s family. It is indeed a matter somewhat unsettled what constitutes the distinction, or who is a real esquire; for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately. And he reckons up four sorts of them; 1. The eldest sons of knights, and their eldest sons in perpetual succession; 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession; both which species of esquires Shelman calls armigeri naturaliti; as he denominates the sons themselves of peers armigeri honorari; 3. Esquires by virtue of their offices, as justices of the peace and others who bear any office of trust under the crown; [if styled esquires by the king in their commissions and appointments.] To these may be added esquires of Knights of the Bath, each of whom constitutes three at his installation; and all foreign, nay, Irish peers; for not only these, but
even the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in law, and must so be named in all legal proceedings. Barristers at law seem also now in full possession of the title of esquire, though originally, as it should seem, attained by usurpation; and being perhaps nearly the same kind of unnecessary addition to their superior degree, as if it were to be annexed or prefixed to that of M. A. or L. L. D.

The court of C. P. however refused to hear an affidavit read, because a barrister named in it was not called esquire. 1 Wils. 224. See 1 Comm. 405. and the notes there. Spelm. Gloss. 43. and this Dict. tit. Precedency.

Esquires of the King, are such who have the title by creation: these, when they are created, have put about their necks a collar of S. S. and a pair of silver sturias is bestowed on them; and they were wont to wear before the prince in war a shield or lance. There are four esquires of the king's body, to attend on his majesty's person. Camden. 111. These are now disused.

Esendi quietum de Tolonio, A writ to be quit of toll; it lies for citizens and burgesses of any city or town that by charter or prescription ought to be exempted from toll, where the same is exacted of them. Reg. Orig. 258. See tit. Toll; Corporation, London.

Essoign, or Essayin, essonium, Fr. essoine—essonzie, Scotch. An excuse for him that is summoned to appear and answer to an action, or to perform suit to a court baron, &c. by reason of sickness and infirmity, or other just cause of absence. It is a kind of imparlance, or craving of a longer time, that lies in real, personal, and mixed actions: and the plaintiff as well as the defendant shall be essoined to save his default. Co. Lit. 131. For the mode of entering an essoin, see Rast. 520.

The causes that serve to essoin, and the essoins are divers, under these heads; 1. Essoin de ultra mare, whereby the defendant shall have forty days; 2. De terrâ sanctâ, whereby defendant shall have a year and a day; 3. De malo venienti, which is likewise called the common essoin; 4. De malo hext, wherein the defendant may by writ be viewed by four knights; 5. De servitio regis. Bract. lb. 5. Britton, cap. 122. Pietsa, lb. 6. And besides the common essoin de malo venienti, i.e. by falling sick in coming to the court, and other essoins abovementioned, there were several other excuses, to save a default in real actions; as constraint of execucies, the falling among thieves, floods of water, and breaking down of bridges, &c. 2 Co. Inst. 125.

After issue joined in dower, quare inedit, &c. one essoin only shall be allowed. Stat. 52 Hen. III. c. 13. And in writs of assise, attaints, &c. after the tenant hath appeared, he shall not be essoined; but the inquest shall be taken by default. Stat. 3 Edw. I. c. 42. Essoin ultra mare will not be allowed, if the tenant be within the four seas; but it shall be turned to a default, c. 44. There is no essoin permitted for an appellant. Stat. 13 Edw I. c. 28. Nor doth essoin lie where any judgment is given, or the party is restrained by his lands; the sheriff is commanded to make him appear; after the party is seen in court, &c. 12 Edw. II. st. 2.

An essoin de servitio regis lies not when the party is a woman; in a writ of dower; where the party hath an attorney in his suit,
&c. [Ibid. The essoin day in court is regularly the first day of the term; but the fourth day after is allowed of favour. 1 Litt. 549. 569. 1 Inst. 135. A corporation is not entitled to an essoin. And the court discourages essoins, and will be glad to use any means to prevent such delay of the defendant. 2 Term Rep. 16. 2 Wils. 164. An essoin lies not on a copias to arrest; and the plaintiff may declare and sign judgment, if no plea. 2 St. 1194.

Essoin day of the term. The first return in every term is, properly speaking, the first day in that term; and thereon the court sits to take essoins, or excuses for such as do not appear according to the summons of the writ: wherefore this is usually called the essoin day of the term. But the person summoned hath three days' grace, beyond the return of the writ in which to make his appearance, and if he appears on the fourth day inclusive, the querio dic post, it is sufficient. 3 Comm. 277. 3 Term Rep. R. B. 185. Seetit. Term.

Essoin de malo villa. Is when the defendant is in court the first day; but gone without pleading; and being afterwards surprised by sickness, &c. cannot attend, but sends two essoiners, who openly protest in court that he is detained by sickness in such a village, that he cannot come, pro lucrari et pro herderis; and this will be admitted, for it lies on the plaintiff to prove whether the essoin is true or not.

Essoins and proffers, Words used in the statute 38 Hen. VIII. c. 21. See Proper.

Establishment or dower, Is the assurance or settlement of dower, made to the wife by the husband on marriage: And assignment of dower signifies the setting it out by the heir afterwards, according to the establishment. Brit. cap. 102, 103. See tit. Dower.

Estache, From the Fr. estacher, to fasten.] A bridge, or stank of stone and timber. Cowel.


Estanques, Wears, or kiddles in rivers. See Magna Carta, &c.

Estate.

Fr. estat. Lat. status.] That title or interest which a man hath in lands or tenements; &c.

An estate in lands, tenements and hereditaments, (says Blackstone,) signifies such interest as the tenant hath therein; so that if a man grants all his estate in Dale to A. and his heirs, every thing that he can possibly grant shall pass thereby. Co. Litt. 345. It signifies the [status] condition, or circumstance in which the owner stands with regard to his property. And, to ascertain this with precision and accuracy, estates may be considered in a threefold view: first, with regard to the quantity of interest which the tenant has in the tenement; secondly, with regard to the time at which that quantity of interest is to be enjoyed; and, thirdly, with regard to the number and connections of the tenants.

First, with regard to the quantity of interest which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain
period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him; or it is circumscribed within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of estates into such as are freehold, and such as are less than freehold.

An estate of freehold, _librum tenementum_, or frank-tenement, is defined by Britton, c. 32, to be "the possession of the soil by a freeman." And St. Germyn, (Doct. & Stud. b. 2. d. 22.) tells us, "that the possession of the land is called, in the law of England, the frank-tenement, or freehold." Such estate, therefore, and no other, as requires actual possession of the land, is legally speaking, freehold; which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feudal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton, § 59, that where a freehold shall pass, it behoveth to have livery of seisin. As therefore estates of inheritance, and estates for life, could not, by common law, be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates. 2 Comm. 103, 104.

Mr. Christian, in his note on the above passage, says; a freehold estate seems to be any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in or arising from real property of free tenure; that is, now, of all which is not copyhold. The learned Commentator himself has elsewhere informed us, "that tithes and spiritual dues are freehold estates, whether the land out of which they issue are bond or free; being a separate and distinct inheritance from the lands themselves." And, in this view, they must be distinguished and excepted from other incorporeal hereditaments issuing out of lands, as rents, &c. which in general will follow the nature of their principal, and cannot be freehold, unless the stock from which they spring be freehold also. 1 Black. Tracts, 116.

Estates of freehold may then be considered, either as estates of inheritance, or estates not of inheritance. The former are again divided into inheritances absolute, otherwise called _fee-simple_, and inheritances _limited_; one species of which is usually called _fee-tail_.

As to estates and tenants in fee-simple, see this Dict. tit. _Fee_, and _Fee-Simple_, Tenures III. 5.

Limited fees, or such estates of inheritance as are clogged and confined with conditions or qualifications of any sort, may be divided into two kinds. 1. _Qualified_ or _base _fees_; 2. _Fees conditional_; so called at the common law; and afterwards _fees tail_, in consequence of the statute _de domis_. As to these latter, see this Dict. tit. _Tail_, and _Fee Tail_, Tenures. A base or qualified fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at
an end. As in the case of a grant to A. and his heirs, tenants of the manor of Dale; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. This estate is a fee, because, by possibility, it may endure for ever in a man and his heirs; yet, as that donation depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee. 2 Comm. 109. See 1 Inst. 27.

Of estates of freehold, not of inheritance, but for life only, some may be called *conditional*, as being expressly created by the act of the parties; others are merely legal, or created by construction and operation of law. See tit. Freehold. As to estates for life, expressly created by deed or grant, see this *Dict.* tit. Life Estate. As to the estate of tenant in tail after possibility of issue extinct, see title Tail, and Fee-Tail. As to tenant by the curtesy, and tenant in dower, see those titles.

Of *estates less than freehold* there are three sorts; 1. Estates for years; 2. Estates at will: as to both which, see this *Dict.* tit. Leases; 3. Estates by *suffrance*; as to which, see this *Dict.* tit. *Suffrance*.

Besides these several divisions of estates, in point of interest, another species may be mentioned, *viz.* Estates upon *Condition*; as to which, see at large tit. Condition; and tit. Mortgage, Statute-Merchant, Statute-Snaffle, *Elequi*.

According to the above division, estates are considered solely with regard to their duration, or the *quantity of interest* which the owners have therein. With regard to the *time of their enjoyment*, when the actual receipt of the rents and profits begins, estates may be considered as either in *possession* or *expectancy*. Of *expectancies*, there are two sorts; one created by the act of the parties, called a *remainder*; the other by act of law, called a *reversion*. Of estates in possession, (which are sometimes called estates executed, whereby a present interest passes to and abides in the tenant, not depending on any subsequent circumstance or contingency, as in the cases of estates *executor*,) little or nothing is to be peculiarly observed; all the estates already spoken of, and treated of under the titles referred to, are of this kind. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the *English* law. And as to so much of it as relates to *remainders* and *reversions*, see this *Dict.* under those titles; and tit. *Executor* Devise, *Limitation*.

Estates, with regard to the *certainty*, and the time of the enjoyment of them, are distinguished by *Fearne*, in the introduction to his *Essay on Contingent Remainders and Executor Devises*, into, 1. Estates *vested in possession*. 2. Estates *vested in interest*; as reversions, vested remainders, such executor devises, future uses, conditional limitations, and other future interests as are not referred to, or made to depend on, a period or event that is *uncertain*; 3. Estates *contingent*; as contingent remainders, and such executor devises, future uses, conditional limitations, and other future interests as are referred to, or made to depend on an event that is *uncertain*. An estate is *vested* when there is an *immediate* fixed right of present or future enjoyment. An estate is *vested in possession* when there exists a *right of present enjoyment*.
An estate is vested in interest when there is a present fixed right of future enjoyment. An estate is contingent when a right of enjoyment is to accrue on an event which is dubious and uncertain.

With respect to the number and connections of their owners, the tenants who occupy and hold them, estates of any quantity or length of duration, whether in actual possession or expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, in common. He that holds lands in severalty, or is sole tenant thereof, is he that holds them in his own right only, without any other being joined or connected with him in point of interest during his estate therein. This is the most common and usual way of holding an estate; and all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and in laying down general rules and doctrines, they are usually applied to such estates as are held in severalty. As to estates in joint-tenancy, in coparcenary, and in common, see tit. Joint-Tenants, Partners.

As to the title to estates, see this Dict. Title; and the references there; and as to the different nature of estates, according to their several tenures, see this Dict. tit. Tenure.

Estates are acquired divers ways; viz. by descent from a father to the son, &c. Conveyance, or grant from one man to another; by gift or purchase; deed or will: and a fee-simple is the largest estate that can be in law. 1 Litt. 541.

Estates are real, of lands, &c. or personal, of goods or chattels; otherwise distinguished into freeholds, that descend to the heir, and chattels which go to the executors: some estates are made by the words of deeds, and others made by law; as an estate in frank marriage given to a cousin, makes a gift in tail.

Also there is an estate that is implied, where tenant in tail bargains and sells his land to a man and his heirs; by this he hath an estate descendible, and determinable upon the death of the tenant in tail. Co. Litt. 10 Rep. 97. If I give lands in Dade to a certain person for life, and after to his heirs or right heirs, he hath the fee-simply; and if it be to his heirs male, he will have an estate-tail. 1 Rep. 66. A man grants to one and his heirs and assigns for his life, and a year over; this is an estate for life only. 39 Edw. III. 25. Litt. 46. If a lease be made, and not expressed for what number of years, it is an estate at will. 2 Shif. Abr. 81.

The word estate generally in deeds, grants, and conveyances, comprehends the whole in which the party hath an interest or property, and will pass the same. 3 Mod. 46. A person in possession of an estate mortgaged in fee, by will gave it to his two daughters, and their heirs; one of them married, and then died: and it being a question, whether her share should be held real or personal estate, and go to the heir, or her husband administrator? It was adjudged for the heir; for here the mortgaged lands shall descend as other lands of inheritance, and be subject to the same rules. Preced. Canc. 266. In such case, if the mortgage in fee be paid off, the money shall be considered as land, and belong to his heirs, as the estate in the land would have done. Ibid. See tit. Mortgage.

Personal estate was devised by a man to his wife for life, and
what she left at her death to be divided between his kindred: he
died, and the widow married again; this devise over was held good
in equity, on a hill brought to have an inventory taken of the estate,
and security given not to embezzle it. But if the same were of
small value, that the widow could not live thereupon, without
spending the stock, it would be otherwise. See tit. Will. Execu-
tory Deviser.

How far the Acceptance of one Estate shall destroy another.

If a lessee for term of twenty years, accepts of a lease of the
same land for ten years, by the lessor's acceptance of the new lease,
the term of twenty years is determined in law. 2 Roll. Abr. 459.

Lease for years to R. B. rendering rent; the next year a lease
was made of the same lands to the lady P. for ninety-nine years;
the next year the said lands were demised to the said R. B. for
forty-one years, who accepted the lease, but that did not extinguish
his first lease; because the lessor, by making the intermediate
lease to the lady P. had only a reversion, and could not afterwards
give any interest to R. B. But if it had not been for this inter-
mediate lease, then the acceptance of the second lease for forty-
one years had been a surrender of the first. Hutt. 104.

If a man hath a lease for years, which is good in law, and after-
wards accepts a new lease of the same lands, which is void in law,
this is no surrender in law of the good lease. Hutt. 105. Baker

A man, in consideration of a marriage to be had with M. R. made
an estate to her for life of certain lands, in full satisfaction of her
dower; afterwards they married, and the husband died, and the
widow brought a writ of dower against the heir, who pleaded in
bar the acceptance of the estate for life; adjudged no good plea;
for such acceptance did not bar her of her dower at the common
law, because she had no title of dower when the acceptance was
made; and besides, no collateral acceptance can bar any right of
inheritance or freehold. See 5 Rep. 11. Vernon's case, and this
Dict. tit. Dower.

A man made a lease of a manor for thirty years, excepting the
wood, &c. and afterwards made a lease of the woods to the same
lessee for sixty years, and a third lease to him of the manor for
thirty years, without any exception; resolved, that by the accept-
ance of this future lease, the lease for sixty years was surrender-
ed; because, by such acceptance, the lessee had affirmed that the
lessor had authority to make a new lease. 5 Rep. 11. Ives's case.

In a special verdict in trespass, the case was, a lease was made
to husband and wife for their lives; and afterwards they accepted
a new lease for themselves and their son: habendum to all three of
them, a die datâs indenture, for the term of their lives, with a
letter of attorney to make livery: adjudged, that the acceptance of
a second lease, to commence a die datâs, was a surrender of the
first, and this by the express agreement in writing of the lessees
themselves; for otherwise the lessor had no power to make a new
lease. Moor, 656.

ESTOPPEL, from the Fr. estouper, i. e. oppressâre, obstâhare.] An
impediment or bar to a right of action arising from a man's own
act: or where he is forbidden by law to speak against his own
deed; for by his act or acceptance he may be estopp'd to allege or
ESTOPPEL.

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If a person is bound in an obligation by the name of A. B. and is afterwards sued by that name on the obligation; now he shall not be received to say in abatement, that he is misnamed, but shall answer according to the obligation, though it be wrong; and forasmuch as he is the same person that was bound, he is estopped and forbidden in law to say contrary to his own deed; otherwise he might take advantage of his own wrong, which the law will not suffer. Terms de Ley. If a man enters into a bond, with condition to give to another all the goods which are devised to him by the father; in this case the obligor is estopped to plead that the father made no will, but he may plead that he had not any goods devised to him by his father. 1 Nels. Abr. 751.

So on bond conditioned to perform the covenants in a certain indenture mentioned, the defendant is estopped from pleading that no such indenture was executed. 2 Bos. & Pull. 399. But see 3 Term. Rep. K. B. 438. that the defendant may plead such plea as tends to show there was no consideration for the bond. See also 3 Term. Rep. 439-441.

In a deed, all the parties are estopped to say anything against what is contained in it: it estops a lessee to say that the lessor had nothing in the land, &c. And parties and privies are bound by estoppel. Litt. 58. Co. Litt. 352. 4 Rep. 53. None but privies and parties shall regularly have advantage by estoppel: but if a man makes a lease of part of a term, whereby he is estopped; and after assign away the term, the assignee will be estopped also. 30 Hen. VI. 2. 4 Rep. 55. In estoppel, both parties must be estopped; and therefore, where an infant or feme covert makes a lease, they are not estopped to say that it is not their deed, because they are not bound by it; and as to them it is void. Cro. Eliz. 36. See tit. Deed. And though estoppel conclude parties to deeds to say the truth, yet jurors are not concluded, who are sworn ad veritatem de et super præmissis dicendam: for they may find any thing that is out of the record; and are not estopped to find truth in a special verdict. 4 Rep. 53. Lutw. 570.

An estoppel shall bind only the heir, who claims the right of him to whom the estoppel was. 8 Rep. 53. Acceptance of rent from a disseisor by the disseisee, may be an estoppel: and a widow accepting less than her thirds for dower, is an estoppel. &c. 2 Dum. Abr. 130. 671.

Our books mention three kinds of estoppel, viz. by matter of record, by matter in writing, and by matter in pais. Co. Litt. 332. If a feoffment be made to two, and their heirs, and the feoffor afterwards levies a fine to them, and the heirs of one of them; this will be an estoppel to the other to demand fee simple according to the deed; for the fine shall enure as a release. 6 Rep. 7. 44. Tenant in tail suffers a recovery, that his issue may avoid; he himself shall be estopped and concluded by it, and may not demand the land against his own recovery. 3 Rep. 3.

The taking of a lease by indenture of a man's own land, whereof he is seised in fee, is an estoppel to claim the fee during the term. Mor. Ca. 333. And. 121. A lease is made to one man for eighty years, and then to another by deed indentured for the same term, this second lease may be good by way of estoppel: and if the first
determine by surrender, forfeiture, &c. the second lessee shall have the land. Co. Rep. 155. If a lessor, at the time of making the lease, hath nothing in the land, but after he gets it by purchase or descent, it is a good lease by estoppel. Dyer, 255. Plowd. 344. Co. Litt. 47. A recital in a deed shall not estop a person, unless it be of a particular fact, or where it is material; when it may be an estoppel. Cro. Eliz. 362.

The lord, by deed indented, reciting that his tenant holds of him by such services, whereas he doth not, confirms to the tenant, saving the services; it is no estoppel to the tenant. 35 Hen. VI. 33. Plowd. 130. If one make a deed by duress of imprisonment, and when he is at large makes a defeasance to it: he is estopped to say it was per duress. Bro. Deeds. 17. Where the condition of a bond is in the particularity, as to enfeoff J. S. of the manor of D. or to pay such a sum of money as he stands bound to pay to W. S. or to stand to the sentence of J. S. in a matter of tithes in question between them; here the party is estopped to deny any of these things, which in the condition he did grant: but if a condition be in the generality, to enfeoff one of all his lands in D. or to be nonsuit in all actions, &c. it is no estoppel. Dyer, 195. 18 Edw. IV. 54.

If a man in pleading confess the thing he is charged with, he cannot afterwards deny it: though a plaintiff shall not be estopped to allege any thing against that which before he hath said in his writ or declaration; and one may not be estopped by the record upon which he was nonsuited. 21 Hen. VII. 34. 2 Leon. III. 17.

An estoppel ought to be certain and affirmative, and a matter alleged that is not traversable, shall not estop; one may not be estopped by acceptance before his title accrued; an estoppel must be insisted and relied on; and where there is estoppel against estoppel, it puts the matter at large. Co. Litt. 532. Hob. 207. Estoppels are to be pleaded relying on the estoppel; without demanding judgment si actio, &c. 4 Rep. 53. See it. Pleading.

If a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title. 3 East's Rep. 346.

ESTOVERS, See it. Common of Estovers. This word hath been taken for any kind of sustenance; as Bracton uses it for that sustenance or allowance, which a man committed for felony is to have out of his lands or goods for himself and his family during his imprisonment. Bract. lib. 3. tract. 2. cap. 18. And the stat. 6 Edw. I. cap. 3. applies it to an allowance in meat, clothes, &c. In which sense it has been used for a wife's alimony.

ESTOVERIS HABENDIS, Writ de. A writ at common law, for a woman divorced from her husband, à mensà et thoro, to recover her alimony, sometimes called her estovers. 1 Lev. 6. See it. Baron and Feme.

ESTRAT, estrature, from the old Fr. estrayer.] Is any valuable animal that is not wild, found within a lordship, and whose owner is not known. In which case, if it be tried and proclaimed according to law, in the church, and two nearest market-towns, on two market days, and is not claimed by the owner within a year, the second lessee shall have the land. Co. Rep. 155.
and a day, it belongs to the king; and now, most commonly, by grant of the crown, to the lord of the liberty. Brit. cap. 17.

It has been suggested that the true reason of the law thus giving the estray to the king or his grantees, and not to the finder, is, that the owner has thus the best chance of having his property restored to him; and it lessens the temptation to commit thefts, as it prevents a man from pretending that he had found an estray, what he had actually stolen: or, according to the vulgar phrase, that he had found which never was lost.

Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property, as *sheep*, *oxen*, *swine*, and *horses*. But animals upon which the law sets no value, as a dog or cat; and animals *fera nature*, as a bear or wolf, cannot be considered as estrays. 1 Comm. 298. Swans may be estrays, but no other fowl, and are to be proclaimed, &c. 1 Roll. Abr. 878. If the beast stray to another lordship within the year, after it hath been an estray, the first lord cannot retake it for until the year and day be past, and proclamation made as aforesaid, he hath no property; and therefore the possession of the second lord is good against him. Cro. Eliz. 716. Finch's L. 177.

If the cattle were never proclaimed, the owner may take them at any time: and where a beast is proclaimed as the law directs, if the owner claims it in a year and a day, he shall have it again; but must pay the lord for keeping. 1 Roll. Abr. 879. Finch, 177. But if any person finds and takes care of another's property, not being entitled to it as an estray, the owner may recover it or its value, without paying the expenses of keeping. 2 Black. Rep. 1117.

An owner may seize an estray, without telling the marks, or proving the property, (which may be done at the trial, if contested,) and tendering amends generally, is good in this case, without showing the particular sum; because the owner of the estray is no wrongdoer, and knows not how long it has been in the possession of the lord, &c. which makes it different from trespass, where a certain sum must be tendered. 2 Salk. 686. In case of an estray the lord ought to make a demand of what the amends should be for the keeping; and then if the party thinks the demand unreasonable, he must tender sufficient amends; but if what he tenders is not enough, the lord shall take issue, and it is to be settled by the jury. Noy, 144. A beast estray is not to be used in any manner, except in case of necessity; as to milk a cow, or the like, but not to ride a horse. Cro. Jac. 148. 1 Roll. 673. Estrays of the forest are mentioned in the statute of 27 Hen. VII. cap. 7.

The king's cattle cannot be estrays or forfeited, &c.

**ESTTREAT, extractum.** The true extract, copy, or note, of some original writing or record, and especially of juries, amercements, &c. imposed on the rolls of a court, to be levied by the bailiff or other officer. Fitz. N. B. 37. 76. See stats. Westm. 1 & 3 Edw. 1. c. 45. Westm. 2. 13 Edw. 1. c. 8. 27 Edw. 1. st. 1. c. 2. 3 Hen. VII. c. 1. 22 & 23 Car. II. c. 22. 4 & 5 W. & M. c. 24. 3 Geo. I. c. 15. § 12.

**ESTRECIATUS, Straightened.** applied to roads. R. Hoveden, p. 783.
ESTREPE, Fr. estropier. To make spoil in lands to the damage of another, as of the reversioner, &c.

ESTREPEMENT, estrepamentum, from the Fr. estropier, mutilare, or from the Lat. extirpare. Any spoil made by tenant for life, upon any lands or woods, to the prejudice of him in reversion: it also signifies the making land barren by continual ploughing. Stat. 6 Edw. I. cap. 13. It seems by the derivation that estrepement is the unreasonable drawing away the heart of the ground, by ploughing and sowing it continually, without manuring or other good husbandry, whereby it is impaired: and yet estropier signifying mutilare, may no less be applied to the cutting down trees, or lopping them further than the law allows. In ancient records, we often find vastum et estrepamentum facere; to make strip and waste.

This word is used for a writ, which lies in two cases; the one, by the stat. of Glouc. 6 Edw. I. c. 13. when a person having an action depending, as a formedon, writ of right, &c. sues to prohibit the tenant from making waste during the suit; the other is for the demandant, who is adjudged to recover seisin of the land in question, after judgment and before execution sued by the writ of habere facias possesssonem, to prevent waste being made till he gets into possession. Reg. Orig. 76. Reg. Judic. 33. Fitz. N. B. 60, 61. 3 Inst. 328.

In suing out these two writs, this difference was formerly observed; that in actions merely possessory, where no damages are recovered, a writ of estrepement might be had at any time pendente lite, nay, even at the time of suing out the original writ or first process: but in an action where damages were recovered, the demandant could only have a writ of estrepement, if he was apprehensive of waste, after verdict had; for with regard to waste done before the verdict was given, it was presumed the jury would consider that in assessing the damages. Fitz. N. B. 60, 61. But now it seems to be held by an equitable construction of the stat. of Glouc. and in advancement of the remedy, that a writ of estrepement to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered, as of those wherein only possession is had of the lands; for perhaps the tenant may not be able to satisfy the demandant his full damages. Ibid. 61. And therefore now in an action of waste itself to recover the place wasted, and also damages, a writ of estrepement will lie as well before as after judgment. For the plaintiff cannot recover damages for more waste than is contained in his original complaint: neither is he at liberty to assign or give in evidence any waste made after suing out the writ; it is therefore reasonable that he should have this writ of preventive justice, since he is in his present suit debarred of any further remedy. 5 Rep. 115.

If a writ of estrepement forbidding waste, be directed and delivered to the tenant himself, as it may be, and he afterwards proceeds to commit waste, an action may be carried on upon the foundation of this writ, wherein the only plea of the tenant can be, non fecit vastum contra prohibitionem; and if upon verdict it be found that he did, the plaintiff may recover costs and damages; or the party may proceed to punish the defendant for the contempt. Moor, 100.

As a writ of estrepement may be directed either to the tenant
and his servants, or to the sheriff; if it be directed to the tenant and his servant, and they are duly served with it, if they afterwards commit waste, they may be committed to prison for this contempt of the writ. But it is said not to be so when directed to the sheriff, because he may raise the noise contendat to resist them who make waste. Hob. 85. Though it hath been adjudged, that the sheriff may likewise imprison offenders if he be put to it; and that he may make a warrant to others to do it. 5 Rep. 115. 2 Inst. 329.

The writ of estreipement lies properly where the plaintiff in a real action shall not recover damages by his action; and as it were supplies damages; for damages and costs may be recovered for waste after the writ of estreipement is brought. See Moor, 109. 2 Inst. 328. If tenants commit waste in houses assigned a feme for dower, on her bringing action of dower, writ of estreipement lies. 5 Rep. 115. See Cru. Eliz. 114. Moor, 622. But pending a writ of partition between co-principals, if the tenant commit waste, this writ will not be granted; because there is equal interest between the parties, and the writ will not lie, but where the interest of the tenant is to be disproved. Goldsb. 30. 2 Nimb. Abr. 754.

In the chancery, on filing of a bill, and before answer, the court will grant an injunction to stay waste; &c. 1 Litt. 547. See tit. Chancery, Waste.

ETHELING or ÆTHELING, Sax.] Signifies noble, and among the English Saxons, it was the title of the prince, or the king's eldest son. Camden. See Adeling.

EVASION, evasio.] A subtle endeavouring to set aside truth, or to escape the punishment of the law; which will not be endured. If a person says to another that he will not strike him, but will give him a pot of ale to strike first, and accordingly he strikes, the returning of it is punishable; and if the person first striking be killed, it is murder; for no man shall evade the justice of the law by such a pretence to cover his malice. 1 H. P. C. 81. No one may plead ignorance of the law to evade it, &c.

EVENINGS. The delivery at even or night of a certain portion of grass or corn, &c. to a customary tenant, who performs the service of cutting, mowing, or reaping for his lord, given him as a gratuity or encouragement. Kennett's Gloss.

EYEDROPPERS, See Eaves-droppers.

EVICT. From cuinco to overcome.] A recovery of land, &c. by form of law. If land is evicted, before the time of payment of rent on a lease, no rent shall be paid by the lessee. 10 Rep. 128. Where lands taken on extent are evicted or recovered by better title, the plaintiff shall have a new execution. 4 Rep. 66. If a widow is evicted of her dower or thirds, she shall be endowed in the other lands of the heir. 2 Danw. Abr. 676. And if on an exchange of lands, either party is evicted of the lands given in exchange, he may enter on his own lands. 4 Rep. 121.

EVIDENCE.

EVIDENTIA.] Proof by testimony of witnesses, on oath; or by writings or records.
It is called evidence, because thereby the point in issue in a case to be tried, is to be made evident to the jury; for probationes debent esse evidentes et perspicue. Co. Litt. 233. The evidence to a jury ought to be upon the oath of witnesses; or upon matters of record, or by deeds proved, or other like authenticated matter. 1 Litt. Abr. 547. And evidence containeth testimony of witnesses, and all other proofs to be given and produced to a jury for the finding of any issue joined between parties. Co. Litt. 283.

The system of evidence, as now established in our courts of common law, is very full, comprehensive, and refined: a summary of the law on the subject is here presented.

The nature of the present work will not allow room for the numberless niceties and distinctions of what is, or is not, legal evidence to a jury. A few of the general heads and leading maxims relative to this point, as well in civil as criminal cases, together with some observations on the manner of giving evidence, are first selected.

Evidence, as has been already remarked, signifies that which demonstrates, makes evident or clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other; and no evidence ought to be admitted to any other point. Therefore, upon an action of debt, when the defendant denies his bond by the plea of non est factum, and the issue is, whether it be the defendant’s deed or no, he cannot give a release of this bond in evidence, for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon, viz. that the bond has no existence.

Again, evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge. As to the latter, see tit. Jury. The former, or proofs, (to which in common speech the name of evidence is usually confined,) are either written; or parol, that is by word of mouth. Written proofs, or evidence, are, 1. Records; and, 2. Ancient deeds of thirty years, standing, which prove themselves; but, 3. Modern deeds; and, 4. Other writings, must be attested and verified by parol evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed. For if it be found there is any better evidence existing than is produced, the very not producing it is a presumption, that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted, but the very deed of lease itself, if in being; but if that positively be proved to be burnt or destroyed, (not relying on any loose negative, as that it cannot be found, or the like,) then an attested copy may be produced; or parol evidence given of its contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases, (as in proof of any general customs, or matters of common tradition or repute,) the courts admit of hearsay evidence, or an account of what persons deceased have declared in their life-time; but such evidence will not be received of any particular facts. So too, books of ac-
counts, or shop-books, are not allowed of themselves to be given in evidence for the owner, but a servant who made the entry may have recourse to them to refresh his memory: and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence. Bull. N. P. 282, 283. Salt. 285. But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long distance of time, the stat. 7 Jac. 1, c. 12. (the penners of which seem to have imagined that the books of themselves were evidence at common law) confines this species of proof to such transactions as have happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unravelled and adjusted.

With regard to parol evidence, or witnesses, there is a process to bring them in by writ of subpensa ad testificandum; which commands them, laying aside all pretences and excuses, to appear at the trial, on pain of one hundred pounds to be forfeited to the king; to which the stat. 5 Eliz. c. 9. has added a penalty of 10l. to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all; nor if he appears, is he bound to give evidence till such charges are actually paid him; except he resides within the bills of mortality, and is summoned to give evidence within the same. This compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, are of excellent use in the thorough investigation of truth.

All witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are infamous, or such as are interested in the event of the cause. All others are competent witnesses; though the jury, from other circumstances, will judge of their credibility. Infamous persons are such as may be challenged as jurors, propter delictum; and therefore shall never be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon a voir dire, if suspected to be secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former class; for no man is to be examined to prove his own infamy. And no counsel, attorney, or other person, entrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence: but he may be examined as to mere matters of fact, as the execution of a deed, or the like, which might have come to his knowledge without being entrusted in the cause. Bull. N. P. 284. 1 Vent. 97.

One witness (if credible) is sufficient evidence to a jury of any single fact; though, undoubtedly, the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy, and therefore does not always demand the testimony of two, as the civil law requires.
Positive proof is always required, where from the nature of the case it appears it might possibly have been had. But, next to positive proof, circumstantial evidence, or the doctrine of presumptions, must take place; for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either necessarily or usually attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved. Stabium presumptione donec probetur in contrarium. Co. Litt. 373.

Violent presumption is many times equal to full proof; for there those circumstances appear, which necessarily attend the fact. Ibid. 6. As if a landlord sues for rent due at Michaelmas, 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary. Gib. Evid. 161. Probable presumption arising from such circumstances as usually attend the fact, hath also its due weight: as if, in a suit for rent due in 1754, the tenant proves the payment of the rent due in 1755, this will prevail to exonerate the tenant; (Co. Litt. 373.) unless it be clearly shown that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake; for otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing. Light, or rash presumptions, have no weight or validity at all.

The oath administered to the witness, is not only that what he deposes shall be true, but that he shall also deposite the whole truth; so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorney, the counsel, and all by-standers, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country. And if either in his directions or decisions he misstates the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a bill of exceptions; stating the point wherein he is supposed to err: See tit. Bill of Exceptions. Or if the legal effect of a record or other evidence is doubted, this may be tried on a demurrer to evidence; see that title. 3 Comm. 367—372.

The true theory of evidence is admirably explained in Bull. N. P. part VI. from Gilbert’s Law of Evidence; and it concludes with taking a view of all the general rules of evidence together, from whence the following abstract is given.

1. The first general rule is, that the best evidence must be given that the nature of the thing is capable of. The true meaning of this rule is, that no such evidence shall be brought as ex natura rei supposes still a greater evidence behind, in the party’s possession or power, for such evidence is altogether insufficient and proves
nothing. But if it is proved that an original deed, will, &c. is in
the hands of the adverse party, or is destroyed without default of
the party who ought to produce it, a copy will be admitted; because
then such copy is the best evidence.

2. No person interested in the question can be a witness. There
is no rule in more general use, and none that is so little under-
stood. See 1 Term Rep. 302. And there are some exceptions to
it; e.g. 1. A party interested will be admitted in a criminal prose-
cution in most instances; 2. He may be admitted for the sake of
trade and the common usage of business; as porters, apprentices,
&c. to prove delivery of goods, &c. though it tend to clear them-
selves of neglect. See 3 Term Rep. 29. Str. 647. 1083. 3. Where
no other evidence is reasonably to be expected. 4. Where he ac-
quires the interest by his own act, after the party who calls him as
a witness has a right to his evidence. 5. Where the possibility of
interest is very remote. See 1 Term Rep. 163, 164. and more at
length, this tit. dir. II. 1.

By stat. 46 Geo. III. c. 37. it is expressly declared, that a witness
cannot by law refuse to answer a question relevant to the matter
in issue, (the answering of which has no tendency to accuse him-
self, or to expose him to penalty or forfeiture of any nature what-
soever,) by reason only, or on the sole ground that the answering
of such question may establish or tend to establish that he owes a
debt, or is otherwise subject to a civil suit, either at the instance
of his majesty, or of any other person or persons.

3. The third general rule is, that hearsay is no evidence. For
no evidence is to be admitted but what is upon oath, and if the
first speech were without oath, another oath that there was such a
speech makes it no more. Besides, if the speaker be living, it is
not the best evidence. But hearsay has been admitted in corro-
boration of a witness's testimony.

4. In all cases where a general character or behaviour is put in
issue, evidence of particular facts may be admitted; but not where
it comes in collaterally.

5. Ambiguitas verborum latens verificatone suppletur, nam quad
ex facto oritur ambiguum, verificatone facti tollitur.

6. In every issue the affirmative is to be proved. A negative
cannot regularly be proved, and therefore it is sufficient to deny
what is affirmed until it be proved; but when the affirmative is
proved, the other party may contest it with opposite proofs, of
some matter or proposition totally inconsistent with what is af-
irmed.

Where the issue is on the life or death of a person once ex-
isting, the proof lies on the party asserting the death. 2 East's
Refl. 312.

Where the law presumes the affirmative of any fact, the nega-
tive of such fact must be proved by the party averring it in plead-
ing. 3 East's Rep. 192.

7. No evidence need be given of what is agreed by the plead-
ings. For the jury are only sworn to try the matter in issue be-
tween the parties, so that nothing else is properly before them.

8. Whenevery a man cannot have the advantage of the special
matter by pleading, he may give it in evidence on the general
issue. See tit. Pleading.
9. If the substance of the issue be proved, it is sufficient. As to this, see also tit. Pleading, Modo et Forma.

The doctrine of evidence in criminal cases is, in most respects, the same as that upon civil actions. There are, however, a few leading points, wherein by several statutes and resolutions a difference is made between civil and criminal evidence.

1. In all cases of high treason, petit treason, and misprision of treason, by stats. 1 Edw. VI. c. 12. and 5 & 6 Edw. VI. c. 11. two lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence confess the same. By stat. 1 & 2 P. & M. c. 10: a further exception is made as to treasons in counterfeiting the king's seals or signatures, and treasons concerning coin current within this realm; and more particularly by c. 11. the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The stats. 8 & 9 Wm. III. c. 25. 15 & 16 Geo. II. c. 28. in their subsequent extensions of this species of treason, do also provide, that the offenders may be indicted, arraigned, tried, convicted, and attainted, by the like evidence, and in such manner and form as may be had and used against offenders for counterfeiting the king's money. But by stat. 7 Wm. III. c. 3. in prosecutions for these treasons to which that act extends, the same rule (of requiring two witnesses) is again enforced; with this addition, that the confession of the prisoner, which shall counterbalance the necessity of such proof, must be in open court. In the construction of which act it hath been held, that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. Foster, 240. 244. But hasty unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And, indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. By the same stat. 7 Wm. III. c. 3. it is declared, that both witnesses must be to the same overt act of treason; or one to one overt act, and the other to another overt act of the same species of treason, and not of distinct heads or kinds: and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. See 2 State Trials, 144. Foster, 235. And, therefore, in Sir John Fenwick's case, in King William's time, where there was but one witness, an act of parliament (stat. 8 Wm. III. c. 4.) was made on purpose to attain him of treason, and he was executed. 5 State Trials, 40. But, in almost every other accusation, one positive witness is sufficient; except in cases of indictments for perjury, where one witness is not sufficient, because then there is only one oath against another. 10 Mod. 194.

2. From the reversal of Colonel Sydney's attainder by act of parliament, in 1689. (8 State Trials, 472.) it may be collected, that the mere similitude of hand-writing in two papers shown to a jury, without other concurrent testimony, is no evidence that both were
written by the same person. 2 Hawk. P. C. 431. yet undoubtedly
the testimony of witnesses, well acquainted with the party's hand;
that they believe the paper in question to have been written by
him, is evidence to be left to a jury. Lord Preston's case, A. D.
1690. 4 State Trials, 463. France's case, A. D. 1716. 6 State
D. 1758. 4 Burr. 644. Sec post, II. 3.

All presumptive evidence of felony should be admitted cau-
tiously: for the law holds that it is better that ten guilty persons
escape, than that one innocent suffer. And Sir Matthew Hale, in
particular, lays down two rules most prudent and necessary to be
observed. 1. Never to convict a man for stealing the goods of a
person unknown, merely because he will give no account how he
came by them, unless an actual felony be proved of such goods;
and, 2. Never to convict any person of murder or manslaughter,
till at least the body be found dead: on account of two instances
he mentions, where persons were executed for the murder of
others, who were then alive, but missing. 2 Hale's P. C. 200.

Lastly, it was an ancient and commonly received practice, (1
State Trials, passim,) that as counsel was not allowed to any pri-
soner accused of a capital crime, so neither should he be suffer-
ed to exculpate himself by the testimony of any witnesses. And
therefore it deserves to be remembered to the honour of Mary I.
that she first desired such evidence to be received in a court of
justice. Afterwards in one particular instance (when embez-
zel the queen's military stores was made felony by stat. 31 Eliz.
c. 4.) it was provided, that any person impeached for such felony,
"should be received and admitted to make any lawful proof that
he could, by lawful witness or otherwise, for his discharge and de-
fence;" and in general the courts grew so heartily ashamed of a
doctrine so unreasonable and oppressive, that a practice was gra-
dually introduced of examining witnesses for the prisoner, but not
upon oath. 2 Bulst. 147. Cro. Car. 292. The consequence of
this still was, that the jury gave less credit to the prisoner's evi-
dence, than to that produced by the crown. Sir Edward Coke pro-
tests very strongly against this tyrannical practice; declaring that
he never read in any act of parliament, book, case, or record, that
in criminal cases the party accused shall not have witnesses sworn
for him; and therefore there is not so much as scientilla juris
against it. 3 Inst. 79. See also 2 Hale's P. C. 283. and his Sum-
mary, 264. And the house of commons were so sensible of this
absurdity, that in the bill for abolishing hostilities between Eng.
land and Scotland, (stat. 4 Jac. I. c. 1.) when felonies committed by
Englishmen in Scotland, were ordered to be tried in one of the three
northern counties, they insisted on a clause, and carried it against
the efforts of both the crown and the house of lords, against the
practice in the courts of England, and the express law of Scot-
land, "that in all such trials for the better discovery of the truth,
and the better information of the consciences of the jury and jus-
tices, there shall be allowed to the party arraigned the benefit of
such credible witnesses, to be examined upon oath, as can be pro-
duced for his clearing and justification." At length, by stat. 7
Wm. III. c. 3, the same measure of justice was established through-
out all the realm, in cases of treason within the act: and it was
afterwards declared, by stat. 1 Ann. st. 2. c. 9. that in all cases of
treason and felony, all witnesses for the prisoner should be exa-
mined upon oath, in like manner as the witnesses against him. 4
Comm. 356—360.

Having given the foregoing general view, more minute in-
formation on this subject may be thus classed:
I. Of written Evidence: Wherein of Matters of Record, as also
of Writings under Statute, and other Writings and Depos-
tions in Chancery or other Courts.
II. Unwritten Evidence: Wherein—
1. Who may be Witnesses.
2. Of the Number of Witnesses, and of compelling them
to appear; as also of the Manner of their giving Evidence.
3. Of parol, presumptive, and hearsay Evidence.

I. Evidence by records and writings, is where acts of parlia-
ments, statutes, judgments, fines and recoveries, proceedings of
courts and deeds, &c. are admitted as evidence. A general act of
parliament may be given in evidence, and need not be pleaded; and
of these the printed statute-book is good evidence: but in the case
of a private act, a copy of it is to be examined by the records of
parliament, and it is to be pleaded. Trials per jura, 177. 232.

Local or personal acts of parliament printed by the king's print-
er may be produced in evidence, if they have a clause inserted
in them for that purpose. See it. Statutes.

The gazette has been held evidence of all acts of state. 5 Term
Rep. 436. So the articles of war, printed by the king's printer,
have been held evidence of such articles. 5 Term Rep. 442.

Journals and other proceedings in the house of commons have
been held to be no evidence. State Trials, vol. 3. 470. but see
page 800. of the same volume. Journals of the house of lords
have been held evidence to prove an address of the lords to the
king, and the king's answer. 5 Term Rep. K. B. 455. A history
of England, or printed trial, may not be read as evidence. 1 Litt.
557. Camden's Britannia was not allowed as evidence: But it has
been held, that a history may be evidence of the general history
of the realm, though not of a particular custom, &c. Skin.
Rep. 523.

An exemplification of the enrolment of letters patent under the
great seal, may be pleaded in evidence. 3 Inst. 173. This ex-
emplification is a copy or transcript of letters patent made from
the enrolment thereof, and sealed with the great seal. But
neither an exemplification nor constat was pleadable at common
law, because there was only the tenor of an enrolment; and the
tenor of a record is not pleadable; but they are now pleadable
by stats. 3 & 4 Edw. VI. c. 4. 15 Edw. c. 6.

A patent may be exemplified under the great seal in chancery;
and also any record or judgment in any of the courts at West-
minster, under the proper seal of each court: all which exemplifi-
cations may be given in evidence to a jury. 1 Litt. 583. Shep. 134. A
rule made, or writ filed, in any court at Westminster, may be ex-
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emphashed in the court where made or filed. But nothing but matter of record ought to be exemplified. 3 Inst. 173.

Records and enrolments prove themselves; and a copy of a record or enrolment sworn to, may be given in evidence. Co. Litt. 117. 262. A transcript of a record in another court may be given in evidence to a jury. 1 Litt. Abr. 551. There is a difference between pleading a record, and giving the record in evidence; if it be pleaded, it must be sub jure sigilli, or the judges cannot judge thereof: Though where it is given in evidence, if it be not under the seal, the jury may find the same, if they have other good matter of inducement to prove it. Style's Rep. 22.

A fine or recovery may be given in evidence, without vouching the roll of the recovery; for the part indented is the usual evidence that there is such a fine: But it is said the fine ought to be shown with the proclamations under seal. 10 Rep. 92. 2 Roll. Abr. 574.

By stat. 14 Geo. II. c. 20. where any person has purchased, or shall purchase, for a valuable consideration, any estate, whereof a recovery was necessary to complete the title, such person, and all claiming under him, having been in possession from the time of such purchase, shall and may, after the end of 20 years from the time of such purchase, produce in evidence the deed, making a tenant to the praecipe, and declaring the uses; and the deed so produced (the execution thereof being duly proved) shall be deemed sufficient evidence that such recovery was duly suffered, in case no record can be found of such recovery, or the same should appear not regularly entered. Provided the person making such deed had a sufficient estate, and power to make a tenant to the praecipe, and to suffer such common recovery.

A record of an inferior court hath been rejected in evidence, and the party put to prove what was done: And proceedings of county courts, courts baron, &c. may be tried by a jury; for it hath been adjudged that they cannot be proved by the rolls but by witnesses. Litt. 75. But court-rolls of a court baron, when shown, are good evidence; and in many cases, copies of the court rolls are allowed as evidence. Trials per puis, 178. 228.

An ancient customary of a manor, delivered down with the court-rolls from steward to steward, although not signed by any person, is good evidence to prove the course of descent within the manor. 1 Term Rep. K. B. 466.

An entry in the court-rolls of a manor, stating the mode of descent of lands in the manor, is admissible evidence of the mode of descent, although no instances of any person's having taken according to it be proved. 5 Term Rep. K. B. 26.

Enrolment of a deed is proved on certifying it by an examined attested copy; though enrolment of a deed which needs no enrolment, or by which the estate does not pass, is only evidence to some purposes. 3 Lev. 387.

By stat. 10 Ann. c. 18. where any bargain and sale enrolled is pleaded with a profert, the party to answer such profert may produce a copy of the enrolment.

With respect to the production of deeds in evidence, the general rule is, that the deed itself must be given in evidence, and must be proved by one witness at the least. But if the oppo-
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site party produce the deed on notice, it shall be read without any proof of the execution. Bull. N. P. 254. 2 Term Rep. 41.

An ancient deed proves itself, where possession has gone accordingly; But later deeds must be proved by witnesses. Co. Litt. 6.

An old deed proved to have been found among deeds and evidences of lands, may be given in evidence to a jury; though the executing of it cannot be proved and made out. 3 Salk. 133. A deed may be good evidence, though the seal is broken off: And where a deed is burnt, &c. the judges may allow it to be proved by witnesses, that there was such a deed, and this be given in evidence. 1 Lev. 25.

Every instrument, to the signing of which there is a witness, must be proved by that witness, if living and to be found: or by proving the hand-writing of the witness, in case he is dead, or domiciled in a foreign country, or cannot be found, so that there may be a presumption of his death. See 7 Term Rep. K. B. 266. 1 Bos. & Pull. 360. 2 East's Rep. 183. 250.

A deed, though sealed and delivered, if not stamped according to act of parliament, cannot be pleaded or given in evidence in any court. See stat. 5 & 6 W. & M. c. 21. and several subsequent statutes; the latter of which extended to bills, notes, receipts, agreements, &c. And these stamps have been frequently the means of detecting forgeries; for the stamp-office put secret marks on the stamps, which from time to time are varied: so where a deed is forged of a date antecedent, it may easily be discovered by stamps being upon it not in use at the time it bears date. A deed cannot be proved by a counterpart of it or copy, if the original is in being, and may be had; though it may be when the original cannot be procured. Co. Litt. 225. 10 Rep. 92. The counterpart of an ancient deed hath been allowed to be given in evidence. Mod. Cas. 225. But it hath been held that the counterpart of a deed, without other circumstances, is not sufficient evidence; unless in case of a fine, when a counterpart is good evidence of itself. 1 Salk. 287.

Where a deed was cancelled by fraud, that being proved, it was allowed to be evidence in an action under the deed. Hutt. 138. The recital of a deed is no evidence without showing the deed; or proving that there was such a deed, and it is lost. Co. Litt. 352. Vaugh. 74. Recital of a lease, in a deed of release, is good evidence that there was such a lease against the releasoar, and those claiming under him, but not against others, except there be proof that there was such a lease. 1 Salk. 285. A settlement set forth in a bill in chancery, and admitted in the answer; and where it was proved that the deed was in the possession of such a one, &c. hath been adjudged a good evidence of the deed of settlement where not to be found. 5 Mod. 384.

The probate of a will, when it concerns personal estate only, may be given in evidence; But where title of lands is claimed under a will, the original will must be shown, not the probate: Though if the will be proved in the chancery, copies of the proceedings there will be evidence. 2 Roll. Abr. 687. Trials per prias, 234. 1 Salk. 286. and Raym. 325. In certain cases the ledger-book of the ecclesiastical court in which the will is entered, is suf-
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Sufficient evidence, being a roll or record of the court. Bull. N. P. 245, 246.

A bill in chancery has been admitted as slight evidence against the complainant: But see 7 Term Rep. K. B. 2. that it is no evidence of the matters stated in it, not even of those on which the prayer for relief is founded; except perhaps in the instance of a family pedigree set forth in the bill. 7 Term Rep. 2. n. a. An answer in chancery is evidence against the defendant himself, though not against others. 1 Venet. 66. Trials per fals, 167. But see 4 East's Rep. 55. and 2 Beo. & Pull. 548. When a party gives an answer in chancery in evidence at a trial, though he insist to read only such a part of it, yet the other side may require to have the whole read. 5 Mod. 10. As in case of a writing permitted to be read to prove one part of an evidence, which may be read to prove any other part of the evidence given to the jury.

Depositions of witnesses in chancery between the same parties, may be given in evidence at law, if the witnesses are dead, and the bill and answer proved. Trials per fals, 167. 207. 234. Regularly depositions in chancery, of a witness, may not be given in evidence if he be alive; unless he be in another kingdom, not subject to the dominion of our king. Ibid. 359. But depositions in chancery, after answer between the parties, may be read as evidence, though the witnesses are not dead, if they cannot be found on search. Shower, 3. 1 Salt. 278. Depositions in chancery in perpetuum rei memoriam, are not to be given in evidence, so long as the parties are living. 1 Salt. 286. And it hath been adjudged that these depositions to perpetuate testimony, on a bill exhibited, shall not be admitted as evidence at a trial at law, except an answer be put in. Raym. 535. If depositions are taken out of the realm, he who makes them is supposed there still, and they shall be read as evidences but if it appears he is in England, they cannot be read, but he must come in person. 1 Litt. 535. Things done beyond sea may be given in evidence to a jury and the testimony of a public notary of things done in a foreign country, will be good evidence. 6 Rep. 47.

Depositions cannot be given in evidence against any person who was not party to the suit: and the reason is, because he had not liberty to cross-examine the witnesses; and it is against natural justice that a man should be concluded in a cause to which he never was a party. Hard. 22. 472. Burn. 50. pl. 94—91. pl. 148—321. pl. 406. 9 Mod. 299. Carth. 181. Vern. 113. Gilb. Evid. 62. Ch. Prec. 212. See this Dict. ut Depositions.

Depositions in the ecclesiastical courts may not be given in evidence to a jury at a trial; but a sentence may in a cause of tithes, &c. And the sentence of the spiritual court is conclusive evidence in causes within their jurisdiction. 1 Salt. 290. 2 Nels. Abr. 761.

Depositions before a coroner are admitted as evidence, the witnesses being dead. 1 Lev. 180. Likewise they have been admitted where a witness hath gone beyond sea. 2 Nels. Abr. 760. The confession of a prisoner before a magistrate, &c. maybe given in evidence against him: see 2 Hawke, P. C. c. 46. and the notes there. The examination of an offender need not to be on
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ought, but must be subscribed by him, if he confesses the fact; and then be given in evidence upon oath by the justice of the peace who took the same. The examination of others must be on oath, and proved by the justice or his clerk, &c. as to their evidence, if they are dead, unable to travel, or kept away by the prisoner. H. P. C. 19. 162. Kel. 18. 55. Wood's Inst. 647.

The examination of an informer before a justice, taken on oath, and subscribed, may be given in evidence on a trial if he be dead, or not able to travel, &c. which is to be made out on oath. 2 Hawk. P. C. 46.

By stat. 1 & 2 P. & M. c. 13. 2 & 3 P. & M. c. 10. justices of peace shall examine persons brought before them for felony, and those who brought them, and certify such examination to the next gaol delivery: but the examination of the prisoner shall be without oath, and the others upon oath; and these examinations shall be read against an offender upon an indictment, if the witnesses be dead. Bull. N. P. 242.

The examination of a pregnant woman taken before a justice of peace under stat. 6 Geo. II. c. 31. is admissible evidence on application to the quarter sessions to make an order of filiation on the putative father, if the woman die before such application is made; and if not contradicted, ought to be conclusive. 5 Term Repl. K. B. 373.

A verdict against one, under whom either the plaintiff or defendant claims, may be given in evidence against the party so claiming; but not if neither claim under it. Mich. 1656, B. R. In ejectment where the plaintiff hath title to several lands, and brings action of ejectment against several defendants, if he recovers against one, he shall not give that verdict in evidence against the rest. 3 Mod. 141.

In an action on a foreign judgment, it is not sufficient to prove the judge's hand-writing subscribed to it, without proving that the seal affixed thereto is the seal of the court. Henry v. Adey, 3 East's Rep. 231.

In a court of common law, a decree in chancery is no evidence. Letters may be produced as evidence against a man in treason, &c. Although a witness swear to the hand and contents of a letter, if he never saw the party write, he shall not be allowed as evidence. Skin. 673. In general cases the witness should have gained his knowledge from seeing the party write; but under some circumstances, that is not necessary; as where the hand-writing to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence, would be admitted to prove it, though he had never seen him write. So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write. On an indictment for writing a treasonable libel, proof of the hand-writing is sufficient, without proof of the actual writing. Bull. N. P. 236.

There is no difference between civil actions and criminal prosecutions as to the evidence of papers. In neither case is the party bound to produce evidence against himself: but even in a criminal prosecution notice may be given to him to produce papers in his possession; and in case of his refusal or neglect, other
evidence may be given of their contents. 2 Term Rep. K. B. 201. n.

Since no witnesses are present when goldsmiths' notes or promissory notes are given, such notes are allowed as evidence of the receipt of money, or other thing. 1 Salk. 283. A church book, some writers say, is not to be admitted as evidence, though others say it may. Cro. Eliz. 411. It is said copies of public books of corporations, &c. shall be evidence. 1 Lev. 25. 1 Litt. 551. But as to books of corporations, where things are entered not of record, the originals are to be produced as evidence.

A pedigree drawn by a herald at arms will not be admitted for evidence, without showing the records or ancient books from whence taken; for the entries in the herald's office are no records, but only circumstantial evidence. Sec tit. Court of Chivalry, as to visitation books. But a copy of an inscription on a grave-stone has been given in evidence in such a case. 2 Roll. Abr. 686. 687. An almanac, wherein the father had written the day of the nativity of his son, was allowed in evidence to prove the munificence of the son. Raym. 84.

Matter in law ought not to be given in evidence at a trial, but only matters of fact, unless it be in case of a special verdict; matter in law is disputable, and reserved to be spoken to in arrest of judgment. Vaugh. 143. 147. In debt the defendant may give in evidence, that he paid money on an obligation before the day, &c. 2 Nela. Abr. 755. And a release may be given in evidence on nil debet. 5 Mod. 18. Though in indebitatus assumptu, the plaintiff shall not give any specialty in evidence to prove his debt, as a bond, indenture, &c. because he may bring action of debt upon that specialty. Moor, 340.

See further, ut. Pleading, General Issue, Copy.

II. 1. The king cannot be a witness under his sign manual, &c. 2 Roll. Abr. 686. Though it has been allowed he may in relation to a promise made in behalf of another. Hob. 213. A peer produced as an evidence, ought to be sworn. 3 Keb. 651. It is no exception to an evidence that he is a judge, or a juror, to try the person; for a judge may give evidence going off from the bench. 2 Hawk. P. C. c. 46. And a juror may be an evidence as to his particular knowledge; but then it must be on examination in open court, not before his brother jurors. 1 Litt. 552. Members of corporations shall be admitted or refused to give evidence in actions brought by corporations, as their interest is small or great; whereby it may be judged whether they will be partial or not. 2 Lev. 231. 241. But they will not generally be admitted; though inhabitants not free of the corporation may be good witnesses for the corporation, as their interest is not concerned; and members may be disfranchised on these occasions. Ibid. 236.

In actions against churchwardens and overseers of the poor for recovery of money misspent on the parish account, the evidence of the parishioners not receiving alms shall be allowed. Stat. 3 & 4 W. & M. cap. 11. In informations or indictments for not repairing highways and bridges, the evidence of the inhabitants of the town, corporation, &c. where such highways lie, shall be admitted. Stat. 1 Ann. cap. 18.
By stat. 27 Geo. III. c. 29. in actions on penal statutes, inhabitants of any place are witnesses to prove an offence, though the penalty be given to the poor, or otherwise for the benefit of the said parish or place, provided the penalty does not exceed 20l.

Kinsmen, though never so near, tenants, servants, masters, attorneys for their clients, and all others that are not infamous, and which want not understanding, or are not parties in interest, may give evidence in a cause, though the credit of servants is left to the jury. 2 Roll. Abr. 685. 1 Vent. 243. A counselor, attorney, or solicitor, is not to be examined as an evidence against their clients, because they are obliged to keep their secrets; but they may be examined as to any thing of their own knowledge before retained, not as counsel or attorney, &c. 1 Vent. 97.

The bail cannot be an evidence for his principal. If the plaintiff makes one a defendant in the suit, on purpose to impeach his testimony, under a pretence of his being a party in interest, he may nevertheless be examined de bene esse; and if the plaintiff prove no cause of action against him, his evidence shall be allowed in the cause. 2 Litt. Abr. 701. But in civil suits, and indictments for trespasses, &c. the plaintiff or prosecutor usually goes through his evidence, and those defendants who are not affected, are sometimes, by direction of the judge, acquitted, and then give evidence for the other defendant or defendants, and sometimes they have been examined without the form of an acquittal. If a man makes himself a party in interest, after a plaintiff or defendant has an interest in his evidence, he may not by this deprive them of the benefit of his testimony. 2 C. & R. 586.

One that hath a legacy given him by will, is not a good witness to prove the will; but if he release his legacy, he may be a good evidence. Skin. 704. It is the same of a deed; he that claims any benefit by it may not be an evidence to prove that deed, in regard of his interest. And a person any ways concerned in the same title of land in question, will not be admitted as evidence. Ibid. 705. But it has been held that an heir apparent may be a witness concerning a title of land; and yet a remainder-man, who hath a present interest, cannot. 1 Salk. 383. If a legatee is permitted to be sworn and examined, the counsel cannot afterwards except against his evidence. 1 Ld. Raym. 730.

To obviate all difficulties and inconveniences, it is enacted, by stat. 25 Geo. I. c. 6. that any devise to a person being witness to any will or codicil, shall be void; and such person shall be admitted as a witness: and that any creditor attesting a will or codicil, by which his debt is charged upon land, shall be admitted as a witness to the execution, notwithstanding such charge; the credit of every such witness being left to the consideration of the court and jury.

Witnesses competent at law are competent to prove a nuncupative will, by stat. 4 Ann. c. 16. s. 14. The son of a legatee is no witness to a will in the spiritual court; nevertheless it is held, he may be a good evidence to prove a nuncupative will, within the intent of the statute of frauds. 1 Lord Raym. 85. See tit. Will.

A grantee who is a bare trustee, it is said, is a good witness to prove the execution of the deed made to himself. 1 P. Wms. 290.

If an action is brought against many persons for taking of goods,
one of them concerned may be admitted as an evidence against
the rest. Comb. 367. See 1 Mod. 282. In criminal cases, as
of robbery on the highway, in action against the hundred; in rapes
of women, or where a woman is married by force, &c. a man or
a woman may be an evidence in their own case. 1 Vent. 243.
And in private enormous cheats, a person may give evidence in
his own cause, where nobody else can be a witness of the cir-
cumstances of the fact, but he that suffers. 1 Salk. 286. Upon
an information on the statute against usury, he that borrows the
money, after he hath paid it, may be an evidence, but not before.
Raym. 191.

An alien infidel may not be an evidence; but a Jew may, and be
sworn on the Old Testament. 1 Inst. 6. A quaker shall not be
permitted to give evidence in any criminal cause; (unless he will
take an oath,) though, on other occasions, his solemn affirmation
shall be accepted instead of an oath. Stat. 7 & 8 Wm. III. cap.
34. See tit. Quaker. The oath of a Gentile, sworn according to
the circumstances of his religion, has been admitted in a civil
matter. 1 Atk. 21. And by Willes, C. J. an infidel in general is
an admissible witness, for the term does not imply that he is an
atheist; but wherever it appears that a witness has no idea of a
God or religion, he shall not be permitted to give his testimony.
1 Atk. 40. 45.

Persons non sana memoria; those that are attainted of conspira-
cy, or in a praemunire upon the statute 5 Eliz. c. 1. Popish re-
cusants convict, on the stat. 5 Jac. I. c. 3. are disabled to give evi-
dence; but see contra, 1 Hawk. P. C. c. 12. 8. 6. So persons con-
victed of felony, perjury, &c. And if one by judgment hath stood
on the pillory, or been whipped; for his infamy he shall not be
admitted to give evidence whilst the judgment is in force; But the
record of conviction must be produced on objecting against his
testimony; and the witness shall not be asked any question to ac-
cuse himself, though his credit may be impeached by other evi-
dences, as to his character in general, so as not to make proof of
particular crimes whereof he hath not been convicted. 3 Inst.
108. 219. 3 Lev. 426. If after a man hath stood in the pillory,
&c. he be pardoned, he may be an evidence: And notwithstanding
judgment of the pillory infers infamy at common law, by the civil
and canon law it imports no infamy, unless the cause for which
the person was convicted was infamous; and therefore such may
be a good witness to a will, if not convicted of any infamous act.
3 Lev. 425, 427. It has been held, that it is not standing in a
pillory disables a person to give evidence, but standing there upon
a judgment for an infamous crime, as forgery, &c. If for a libel, a
man may be a witness. 5 Mod. 74. 3 Nels. Abr. 557.

Persons excommunicated cannot be witnesses, because being
excluded out of the church, they are supposed not to be under
the influence of any religion. But persons outlawed may be wit-
nesses, because they are punished in their properties, and not in
the loss of their reputation; and the outlawry has no manner of

A man is convicted of felony, and afterwards pardoned, he may
be a good evidence. Raym. 362. So where burnt in the hand,
which is quasi a statute pardon; and it is said this burning in the
hand restores the offender to his credit. *Ibid. 330.* A person who was condemned to be hanged for burglary, but having a pardon for transportation, hath been allowed to be a good evidence. *5 Mod. 18.* One outlawed for treason and pardoned, may be an evidence. *State Trials,* vol. 3. 515. Persons acquitted, or guilty of the same crime, (while they remain unconvicted,) may be evidence against their fellows. *Kel. 17.* Though no evidence ought to be given of what an accomplice hath said, who is not in the same indictment. *State Trials,* vol. 2. 414. An informer may be a witness, though he is to have part of the forfeiture, where no other witnesses can be had. *Wood's Inst.* 598. Members of either house of parliament may be witnesses on impeachment. *State Trials,* vol. 2. 632.

Idiots, madmen, and children, (see tit. *Infants,* ) are excluded from giving evidence for want of skill and discernment.

2. In addition to what has been already said as to the number of witnesses, we may mention that it is required by stat. 29 *Car. II.* cap. 3. "That all devises of *lands* shall be attested and subscribed in the presence of the testator, by three or four credible witnesses, or else shall be void." See tit. *Will.*

If a witness, served with a process in a civil cause, refuse to appear, being tendered reasonable charges, and having no lawful excuse, action on the case lies against him, wherein damages shall be recovered: And a *feme covert* not appearing, action may be brought against the husband and her. *Stat. 5 Eliz. cap. 9.* 1 *Leon.* 112.

If there is a doubt that a witness will not attend, the best way is to serve him with the original *subhana,* keeping a copy; and if he is at any distance from the place of trial, tender reasonable charges: if he does not appear at the trial, call him three times on his *subhana,* and then, if occasion requires, the party may bring his action, or move for an attachment.

In a criminal cause, if a witness refuse to appear and give evidence, being served with process, the court will put off the trial, and grant attachment against him; and, as refusing to give evidence is a great contemn, the party may be committed and fined. 1 *Salk. 278.*

Preventing evidence to be given against a criminal is punishable by fine and imprisonment; and a person was fined one thousand marks in such a case. *Hill. 1663,* B. R. Persons dissuading a witness from giving evidence, &c. and jurors or others disclosing evidence given, are likewise offences punished by fine and imprisonment. 2 *Hawk. P. C. c.* 22.

By stat. 26 *Geo. III.* c. 71. § 16. (made to prevent *horse-stealing,* and which see under that head,) the justice before whom complaint shall be made for any offence against the act, may summon any person, other than the party complained against, to appear before him to give evidence; and in case such person shall wilfully refuse or neglect to attend, or give evidence, he shall forfeit 10l. and in default of payment, or in case of inability, shall stand committed to gaol for not more than two months, nor less than one. And similar punishments are inflicted by other statutes.

Where necessity requires, witnesses may be examined apart in court, till they have given all they have to say in evidence; so that
what one has deposed, may not induce another to give his evidence to the same effect. Fortesc. 54.

A witness shall not be examined where his evidence tends to clear or accuse himself of a crime. State Trials, vol. 1. 537. Nor is he bound to give any answer by which he confesses or accuses himself of any crime. And a witness shall not be cross-examined till he hath gone through the evidence on the side whereon produced. Ibid. vol. 2. 772. But a witness cannot by law refuse to answer on the ground only that his answer may establish a debt due from him to the king, or any other. Stat. 46 Geo. III. c. 37. See ante.

The court, in criminal cases, is to examine the witnesses, and not the prisoner or prosecutors. Ibid. vol. 1. 143. Though, in case of the court, counsel are frequently admitted to examine the evidence. A witness shall not be permitted to read his evidence, but he may look on his notes to refresh his memory. Ibid. vol. 4. 45. A witness may not recite his evidence to the jury; after gone from the bar, and he hath given his evidence in court; if he doth, the verdict may be set aside. Cro. Eliz. 159. One that is to be a witness at a trial ought not to be examined before the trial, but by the consent of both parties, and a rule of court for that purpose; and sometimes by a judge's order at chambers witnesses are examined on interrogatories, where such witness is about to leave the kingdom.

No evidence ought to be produced against a man in a trial for his life, but what is given in his presence. State Trials, vol. 4. 227. And evidence shall not be given against the prisoner for any other crime than that for which prosecuted. Ibid. vol. 3. 947. But upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery. Rex v. Wylie, New Rep. i. 92. A prisoner may bring evidence to prove that the witnesses gave a different testimony before a justice of peace, or at another trial: though he may not call witnesses to disprove what his own witnesses have sworn. State Trials, vol. 2. 623. 792. And no objection can be made to the evidence after verdict given. Ibid. vol. 4. 35. It is justifiable to maintain or subsist an evidence, but not to give him any reward; for this, if proved, will avoid his testimony. Ibid. vol. 2. 470.

A witness shall not be examined to any thing that does not relate to the matter in issue. Ibid. vol. 2. 343. And where an issue is not perfect, no evidence can be applied, nor can the justices proceed to trial. Brownl. 42. 47. 455. If evidence doth not warrant and maintain the same thing that is in issue, the evidence is defective, and may be demurred upon; but proving the substance is sufficient. Trials for facts, 425. Evidence may be given of facts before and after the time they are laid in the indictment. And where a place is laid only for a venue in an indictment, or an appeal, (and not made part of the description of the fact,) proof of the same crime may be made at any other place in the same county; and after a crime hath been proved in the county where laid, evidence may be given of other instances of the same crime, in another county, to satisfy the jury. 2 Hawk. P. C. c. 46.
But where a certain place is made part of the description of the fact against the defendant, the least variation as to such place between the evidence and indictment is fatal. 2 Hawk. P. C. c. 46. It hath been also adjudged, that where an indictment sets forth all the special matter, in respect whereof the law implies malice, variance between the indictment and evidence as to the circumstances of the fact, doth not hurt; so that the substance of the matter be found by the evidence. Ibid.

3. It seems to have been agreed, as a general rule, (even before the statute of frauds and perjuries,) that no parol evidence could be admitted to control what appeared on the face of a deed or will, not only from the danger of perjury, but from a presumption, that whatsoever the parties at that time had in contemplation, was reduced into writing. 5 Co. 63. a. b. 8 Co. 155. a. Kelw. 49.

But this rule has received a relaxation, especially in the courts of equity, where a distinction has been taken between evidence that may be offered to a jury, and such as may be used only to inform the conscience of the court; viz. that in the first case no such evidence should be admitted, because the jury might be inveigled thereby; but that in the second it could do no hurt, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence. 2 Vern. 98. 337. 625.

Also to ascertain a fact, parol evidence hath been admitted to explain the intent of the testator: as where the testator had two sons both named John, and he devised lands to his son John; here parol evidence was admitted to show which of his sons he meant; and it being proved that one of his sons of that name had been absent several years beyond sea, and that the testator apprehended that he was dead, the devise was held good, and that the other should take; for without such evidence the will must be void. 2 Vern. 98. 337. 625. So parol evidence may be admitted to explain the intent of a testator in cancelling a will. Cowp. 53.

Parol evidence to prove that a bond was given, in lieu of dower, refused. 1 Wils. 34. Parol proof admitted that the testator intended his wife executrix should have the residue undisposed of. Id. 313. Debt upon bond with condition for payment of money to Lydia Doyce, who is a third person, she declares the defendant owes her nothing, and upon proof thereof, a verdict was for the defendant; such declaration was properly given in evidence, for Lydia Doyce is to be considered as the real plaintiff. Id. 257.

Parol evidence shall not be admitted to annul or substantially vary a written agreement, where there is no latent ambiguity. 3 Wils. 275. Str. 794. 3 Term Rep. 590. 2 Bos. & Pull. 565. But parol evidence may be admitted to explain a written instrument or agreement which, on the face of it, appears to be equivocal. 8 Term Rep. 379.

Parol evidence shall not be received to prove an additional rent payable by a tenant beyond that expressed in the written agreement for a lease. 2 Bl. Rep. 1249.

Parol evidence may be admitted to prove other considerations than those mentioned in a deed; as where the conditions mentioned in the deed were 10,000l. and natural love and affection, and the premises were worth 50,000l. an issue was directed to try
whether natural love and affection made any part of the consideration; and it being found that they did not, the deed was set aside. 7 Bro. P. C. 70. cited 3 Term Rep. 473.

In an action on a policy, the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the register acts. (See tit. Navigation Acts.) And such parol evidence of ownership, arising from possession at a particular period, was not disproved by showing a prior register in the name of another, and a subsequent register to the same person. 4 East's Rep. 150.

By the statute of frauds, several things must be evidenced by writing, of which, before that statute, parol evidence had been sufficient. See this Dict. tit. Fraud.

Sometimes violent presumption will be admitted for evidence without witnesses; as where a person is run through the body in a house, and one is seen to come out of the house with a bloody sword, &c. But on this the court ought not to judge hastily. 1 Inst. 6. 673. And though presumptive and circumstantial evidence may be sufficient in felony, it is not so in treason. State Trials, vol. 4. p. 507.

Persons once in being shall be intended still living, if the contrary is not proved. 2 Roll. Rep. 461. But now, by stat. 19 Car. II. c. 6. it is enacted, "that if any person or persons, for whose life or lives estates have been, or shall be granted, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof made of the life or lives of such person or persons respectively, in any action commenced for the recovery of such tenements by the lessors or reversioners, in every such case the person or persons, upon whose life or lives such estate depended, shall be accounted as naturally dead; and in every action brought for the recovery of the said tenements, by the lessors or reversioners, their heirs or assigns, the judges, before whom such action shall be brought, shall direct the jury to give their verdict, as if the person so remaining beyond the seas, or otherwise absenting himself, were dead." See tit. Life Estate, Presumption.

A clerk of the post-office, accustomed to inspect franks for the detection of forgeries, has been admitted to prove that the handwriting of an instrument is an imitated, and not a natural hand, though he never saw the party write: and also to prove that two writings, suspected to be imitated hands, were written by the same person. 4 Term Rep. K. B. 497.

As to hearsay evidence, it seems that the two principal cases, if indeed not the exclusive cases, in which it is admissible, are pedigrees and prescriptions. See 3 Term Rep. 707. Unless we add cases in which no other evidence can be procured, as with respect to possession of premises, &c. See 2 Term Rep. 53. 55.

Declarations of a party accompanying an act done, and tending to explain such act, are evidence for the latter purpose as part of the res gesta.

It seems agreed, that what another has been heard to say, is no evidence, because the party was not on oath; also because the party, who is affected thereby, had not an opportunity of cross-
examining; but such speeches or discourses may be made use of by way of inducement or illustration of what is properly evidence. 1 Mod. 383. 5 Stin. 405.

Also what a witness hath been heard to say at another time may be given in evidence, in order either to invalidate or confirm the testimony he gives in court. 2 Hawk. P. C. c. 46. So what a person accused of a crime hath been heard to say at another time, may be given in evidence at his trial, for or against him. Id. ib.

A witness by hearsay of a stranger shall not be allowed, except perhaps to confirm the evidence of a witness that hath spoken of his knowledge. Wood's Inst. 644.

If a person who gave evidence in a former trial be dead; upon proof of his death, any person who heard him give evidence may be admitted to give the same evidence between the same parties; but a copy of the record of the trial when the evidence was given ought to be produced. 3 Inst. 2. 2 Litt. Abr. 705.

Evidence given at one trial in criminal cases, has been held not to be evidence at another's trial. 2 State Trials, 863.


EWAGE, from the Fr. eau, water.] Toll paid for water-passage: see Aquage.

EWBRICE, Sax. ew, i.e. conjugium, and bryce, fraetio.] Adultery or marriage-breaking: from this Saxon word ew, marriage, we derive our present English woo, to court.

EWE, ewe. A German word signifying law; it is mentioned in Leg. W. 1.

EXACTION, Is defined to be a wrong done by an officer, or one in pretended authority, by taking a reward or fee for that which the law allows not. The difference between execution and extorsion is this: extorsion is where an officer extorts more than his due, when something is due to him; an execution is, when he wrests a fee or reward where none is due; for which the offender is to be fined and imprisoned, and render to the party twice as much as the money he so takes. Co. Litt. 358. 10 Rep. 100. See tit. Extortion.

EXACTOR REGIS, The king's exactor or collector of taxes; sometimes taken for the sheriff. Niger Liber Stace. par. 1. cap. ult.

EXAMINATION, examinatio.] A searching by, or cognisance of a magistrate. See this Dict. tit. Commitment, Evidence, Justice.

With respect to examinations touching church benefices, see tit. Benefice.

EXAMINERS IN THE CHANCERY, examinatores.] Two officers of that court, who examine, upon oath, witnesses produced by either side, in London, or near it, on such interrogatories as the parties to any suit exhibit for that purpose; and sometimes the parties themselves are, by particular order, likewise examined by them. In the country, witnesses are examined by commissioners,
EXC

(usually attorneys not concerned in the cause,) on the parties joining in commission, &c. See tit. Depositions.

EXANNUAL ROLL. In the old way of exhibiting sheriffs' accounts, the illieviable fines and desperate debts were transcribed into a roll under this name; which was yearly read, to see what might be gotten. Hale's Sher. Acco. 57.

EXCAMBIATORES, A word used anciently for exchangers of land: but Cowel supposes them to be such as we now call brokers, that deal upon the exchange between merchants.

EXCEPTION. exceptio.] Is a stop or stay to an action; and divided into dilatory and peremptory. Bract. lib. 5. tract. 5. In law proceedings, it is a denial of a matter alleged in bar to the action; and in chancery it is what is alleged against the sufficiency of an answer, &c. The counsel in a cause are to take all their exceptions to the record at one time; and before the court hath delivered any opinion thereon. 1 Litt. Abr. 559. And on an indictment for treason, &c. exception is to be taken for misnaming, false Latin, &c. before any evidence is given in court, or the indictment shall be good. Stat. 7 Wm. III. c. 3. See tit. Indictment, Treason.

Where, by a general pardon, any particular crime is excepted; if a person be attainted, &c. of that offence, he shall have no benefit of the pardon. 6 Rep. 13. 2 Nels. Abr. 755. And when a pardon is with an exception as to persons, the party who pleads it ought to show that he is not any of the parties excepted. 1 Lev. 26. A negative expression may be taken to enure to the same intent as an exception; for an exception in its nature is but a denial of what is taken to be good by the other party, either in point of law or pleading. And exceptio in non exceptis firmat regulam. 1 Litt. 559.

Exception to evidence, &c. See this Dict. tit. Bill of Exceptions.

Exception in deeds and writings, Keeps the things from passing thereby; being a saving out of the deed, as if the same had not been granted: but it is to be a particular thing out of a general one, as a room out of a house, ground out of a manor, timber out of land, &c. And it must not be of a thing expressly granted in a deed: also it must be of what is severable from, and not inextricably incident to, the grant. Co. Litt. 47. 1 Lev. 287. Cro. Eliz. 244.

Where an exception goeth to the whole thing granted or demised, the exception is void. Cro. Eliz. 6. A man makes a lease of a manor, excepting all courts, &c. the exception is void as to the courts; for having leased the manor, it cannot be such without courts. Hob. 108. Mov. 870. A lease was made of all a man's lands in L. excepting his manor of H. and he had no lands in L. but the said manor; it was adjudged that the manor passed, and that the exception was void. Hob. 170. 2 Nels. Abr. 764. A lease of a house and shops, except the shops; though this may extend to other shops, it is void as to the shops belonging to the house demised, because it is repugnant to the lease. Dyer, 265.

If an exception crosses the grant, or is repugnant to it, the same is void: and if there be a saving or exception out of an exception,
it may make a particular thing as if never excepted; as if a lease be made of a rectory, excepting the parsonage-house, saving to the lessee a chamber; this chamber not being excepted out of the lease, shall pass by the lease of the rectory. *Hob. 72. 170. Cro. Eliz. 273. Owen, 20.

By exception of trees, the soil is not excepted, but only sufficient nutriment for the trees: for the lessee shall have the pasture growing under them, though the lessor shall have all the benefit of the trees, mast, fruit, &c. and the trees are parcel of the inheritance. *5 Rep. 11. 11 Rep. 48. 50. But it has been adjudged, that, by an exception of woods, underwood, and coppices, the soil of the coppices is excepted. *Ps. 145. Cro. Jac. 487. If a lessee for years assign over his term, excepting the trees, &c. the exception is not good, because no one can have a special property in the trees, but the owner of the land. *2 Nels. 764. Though where lessee for life makes a lease for years, excepting the wood, &c. this may be a good exception, although he hath not any interest in it but as a lessee, in regard he is chargeable in waste, &c. and hath not granted his whole term. *Cro. Jac. 296. 1 Litt. Abr. 560. These exceptions are commonly in leases for life and years; and must be always of a thing in esse. *Co. Litt. 47. See tit. Grant, Deed, Lease, Condition.

**EXCHANGE.** *ex cambium or cambium; with the civilians, permutatio.*] The king's exchange, is the place appointed by the king for exchange of plate or bullion for the king's coin, &c. These places have been divers heretofore; but now there is only one, viz. the mint in the tower. See stats. 25 Edw. III. st. 5. c. 12. 5 & 6 Edw. VI. c. 19. and this Dict. tit. Coin, Money. There is also a Royal Exchange of Merchants in London.

Exchange among merchants is a commerce of money, or a bartering or exchanging of the money of one city or country for that of another: money, in this sense, is either real or imaginary; real, any species current in any country at a certain price, at which it passes by the authority of the state, and of its own intrinsic value; and by imaginary money is understood, all the denominations made use of to express any sum of money, which is not the just value of any real species. *Lex Mercatoria.*

The methods of exchange for money used in England ought to be *par pro par,* according to value for value: and our exchange is grounded on the weight and fineness of our own money, and the weight and fineness of that of other countries according to their several standards proportionable in their valuation; which being truly and justly made, reduces the price of the exchange of money of any nation or country to a certainty. But this course of exchange is of late abused, and money is become a merchandise, that rises and falls in its price in regard to the plenty and scarcity of it. At London, all exchanges are made upon the pound sterling of 20s. In the Low Countries, France and Germany, upon the French crown; Spain and Italy, &c. upon the ducat; and at Florence, Venice, and other places in the Straits, by the dollar and florin. See tit. Bill of Exchange.

**Exchanges of Goods and Merchandise.** Were the original and natural way of commerce, precedent to buying; for there was no buying till money was invented; though in exchanging, both par-
ties are as buyers and sellers, and both equally warrant. 3 Salk. 157.

If A. and B. agree to exchange horses, and B. give a sum of money to A. to bind the bargain, A. may maintain an action against B. for not delivering his horse, without alleging any delivery of or offer to deliver his own to B., for the payment of earnest-money vests the property of A.'s horse in B. But in such an action A. must allege a special demand on B. for his horse. 5 Term Rep. K. B. 409.

Exchange of lands, A mutual grant of equal interest in land or tenements, the one in consideration of the other: and is used peculiarly in our common law for that compensation which the warrantor must make to the warrantee, value for value, if the land warranted be recovered from the warrantee. Bract. lib. 2. cap. 16. Accomp. Conv. vol. 1. 170. Also there is a tacit condition of re-entry in this deed, on the lands given in exchange, in case of eviction; and on the warranty to vouch and recover over in value, &c. For if either of the parties is evicted, even of a part, the exchange is defeated. 4 Rep. 121. Cro. Eliz. 903.

The word exchange is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocation. 1 Inst. 50, 51. The estates exchanged must be equal in quantity of interest, value is immaterial; as fee-simple for fee-simple, a lease for 20 years for a lease for 20 years, and the like. Litt. § 64, 65. And the exchange may be of things that lie either in grant or in livery. But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance; for each party stands in place of the other, and occupies his right, and each of them hath already had corporal possession of his own land. Litt. § 62. Entry however must be made on both sides; for if either party die before entry, the exchange is void for want of sufficient notoriety. 1 Inst. 50.

An exchange may be made of lands in fee-simple, fee-tail, for life, &c. The estates granted are to be equal, as fee-simple for fee-simple, &c. though the lands need not be of equal value, or of the like nature: for a rent in fee issuing out of land, may be exchanged for land in fee. Litt. 63, 64. Co. Litt. 50, 51. If an exchange be made between tenant for life and tenant in tail after possibility of issue extinct, the exchange is good; because their estates are equal. 11 Rep. 80. Nour, 655.

An exchange made between tenant in tail, and another, of an unequal interest, may be good during his life; but his issue, when of full age, shall avoid it. And exchanges made by infants; by persons non sano memoriæ; a husband of the wife's lands, &c. are not void, but voidable only; by the infant at his full age, the heir of the person non sano memoriæ, and the feme after the death of the husband, who may waive the possession, and disagree to them. Perk. § 277. 281.

Two joint-tenants and two tenants in common may exchange their lands: and, by this deed, freeholds pass without livery and seisin; but the word exchange is to be used; and there must be execution of the exchange, by entry on the lands in the life of the parties, or the exchange will be void. 1 Inst. 51. 1 Mod. 91. See tit. Lease; Release; as to making exchange by those conveyances.
Littleton expresses himself concerning an exchange as of a transaction between two; and in the case of Eton College, 2 Wils. part 3. p. 483. the court held, that an exchange in the strict legal sense of the word, cannot be between three; the principles of it not being applicable to more than two distinct contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends; and the case abovementioned, of tenants in common exchanging with joint-tenants, is not irreconcilable to this rule; because though four persons may be named, yet they constitute only two distinct parties; and consequently there is the same reciprocity as if the transaction were between two persons only. And this applies to any number of persons, if so conjoined, as to make only two distinct relative parties. 1 Inst. 50. b. 51. a. in notis.

Sometimes lands intended to pass by exchange, not having the qualities and incidents of exchanged lands, may pass by way of gift or grant; as if two persons are seised of two acres of land, and one of them by deed gives his acre to the other, and the other his acre to him, and each of them gives livery of seisin upon his acre given in exchange; here the acres will pass from one to the other, but not in a way of exchange, because there was no word of exchange in the deed. Litt. sect. 62. Perk. 253.

A man grants to another lands in fee-simple, for lands in tail, by way of exchange; or land in tail, for lands for life, &c. these deeds will not take effect as exchanges. Rent. Exchange, 15. 54. Co. Litt. 64. If tenant in tail give his land in exchange, for other land of the same estate-tail, the issue in tail may make it good if he will, or avoid the exchange. 1 Rep. 96. A feuemento is made to A. and B. and the heirs of A. and they exchange the land for other lands, this will be good, and they shall hold the lands in the same nature that the land given in exchange was held. Perk. § 277.

If a lord release to the tenant his services in tail, in exchange of land given to the lord in exchange in tail also, it is ill; but if lessee for life of one acre, give another acre to his lessor in tail, in exchange for a release from him of that acre, habendum in tail in like manner, it is a good exchange. Perk. § 219. 276. 283. In case two persons make an exchange of land, and limit no estate, each shall have an estate for life by implication: but if an express estate be limited to one for life, and none to the other, it will be void. 19 Hen. VI. 27. And to make a good exchange, both the things must be in esse at the time of the exchange. Co. Litt. 50. 3 Edw. IV. 10.

But an exchange may be made to take effect in futuro, as well as presently; for if it be, that after the feast of Easter, A. B. shall have such lands in D. in exchange for his lands in S., this is good. Perk. § 265.

By a special kind of agreement, an exchange may be of unequal estates. Moor. c. 209. The condition and warranty in exchanges run to the parties in privyty; not to an assignee, &c. And if after two have exchanged lands, one of them releases to the other the warranty in law, it will not destroy the exchange. 4 Rep. 122. 1 Roll. Abr. 815. The parties themselves, and all privyes and strangers, for the most part may take advantage of exchanges void by any defect or accident: contra, if they are voidable, &c. 1 Rep. 195. Dyer, 285.
Exchange of church livings. These exchanges are now seldom used, except that parsons sometimes exchange their churches, and resign them into the bishop's hands; and this is not a perfect exchange till the parties are inducted; for if either dies before they both are inducted, the exchange is void. *Wood's Inst.* 284. 2 Comm. 323.

By stat. 31 Eliz. c. 5. § 8, if any incumbent of any benefice with cure of souls, shall corruptly resign or exchange the same; or corruptly take for or in any respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money, or other benefit whatsoever; as well the giver as the taker, shall lose double the value of the sum; half to the crown, and half to him that shall sue for the same. See this *Dict.* tit. *Simony, Advowson.*

If two parsons by one instrument agree to exchange their benefices, and in order thereto resign them into the hands of the ordinary, such exchange being executed on both parts, is good, and each may enjoy the other's living: but the patrons must present them again to each living; and if they refuse to do it, or the ordinary will not admit them respectively, then the exchange is not executed; and in such case either clerk may return to his former living, even though one of them should be admitted, instituted, and inducted to the benefice of the other; which is expressed in the exchange itself, and the protestation usually added to it. 2 Rep. 74. *Roll. Abr.* 814.

EXCHANGEORS. Those that return money by *bills of exchange.* See *Excambitores.* 5 Rich. II. c. 2.

EXCHEQUER.

Scaccarium, from the Fr. *eschequier,* i. e. *abacus tabula lusoria,* or from the Germ. *schatz,* viz. *thesaurus.* An ancient court of record, wherein all causes touching the revenue and rights of the crown are heard and determined, and where the revenues of the crown are received. *Camden,* in his *Britann.* p. 113, saith, This court took its name à *tabulâ ad quam assidebant,* the cloth which covered it being partly coloured, or chequered; we had it from the *Normans,* as appears by the *Grand Customary,* cap. 56. where it is described to be an assembly of high justiciers, to whom it appertained to amend that which the inferior justiciers had misconceived, and unadvisedly judged, and to do right to all, as from the prince's mouth; and this seems the origin of the court of *exchequer-chamber.*

The court of *exchequer* is inferior in rank not only to the court of king's bench, but to the common pleas also; it is a very ancient court of record, set up by William the Conqueror as a part of the *aula regia,* though regulated and reduced to its present order by King *Edw.* I. and intended principally to order the revenues of the crown, and to recover the king's debts and duties. *4 Inst.* 103—116. It is called the exchequer, *scaccarium,* from the chequed cloth, resembling a chess-board, which covers the table there, and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions; the receipt of the exchequer, which manages the royal revenue; and the court or judicial part of it; which latter is again subdivided into a court of equity, and a court of common law.
The court of equity is held in the exchequer-chamber, before the lord treasurer, the chancellor of the exchequer, the chief baron, and three puisne barons. These Mr. Selden conjectures (Titles of Hon. 2. 5. 16.) to have been anciently made out of such as were barons of the kingdom, or parliamentary barons, and thence to have derived their name; which conjecture receives great strength from Bracton's explanation of Magna Carta, c. 14. which directs that the earls and barons be amerced by their peers; that is, says he, by the barons of the exchequer, l. 3. tr. 2. c. 1. § 3.

The primary and original business of this court is to call the king's debtors to account, by bill filed by the attorney-general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by the original constitution the jurisdiction of the courts of common pleas, king's bench, and exchequer, was entirely separate and distinct; the common pleas being intended to decide all controversies between subject and subject; the king's bench, to correct all crimes and misdemeanors that amount to a breach of the king's peace; and the exchequer, to adjust and recover the king's revenue. See this Dict. tit. Courts, King's Bench, Common Pleas. But as, by a fiction, almost all sorts of civil actions are now allowed to be brought in the king's bench, in like manner, by another fiction, all kinds of personal suits may be prosecuted in the court of exchequer. For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court, so also the king's debtors and farmers, and all accountants of the exchequer, are privileged to sue and implead all manner of persons in the same court of equity that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common law actions (where the personally only is concerned) as are prosecuted in the court of common pleas.

This gives origin to the common law part of their jurisdiction, which was established merely for the benefit of the king's accountants; and is exercised by the barons only of the exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are grounded is called a quo minus; in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of; quo minus sufficiens existit, (by which he is the less able,) to pay the king his debt or rent. And these suits are expressly directed by what is called the statute of Rutland, 10 Edw. I. c. 11. to be confined to such matters only, as specially concern the king or his ministers of the exchequer. And by the articuli super cartas, 28 Edw. I. c. 4. it is enacted, that no common pleas be thenceforth holden in the exchequer, contrary to the form of the great charter. But now, by the suggestion of privilege, any person may be admitted to sue in the exchequer, as well as the king's accountant. The surmise of being debtor to the king is therefore become matter of form, and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court; for there any person may file a bill against another upon a bare suggestion that he is the king's accountant; but whether he is so or not is never controverted.
In this court, on the equity side, the clergy have long used to exhibit their bills for the non-payment of tithes, in which case the surmise of being the king's debtor is no fiction, they being bound to pay him their first fruits and annual tenths. But the chancery has of late years obtained a large share in this business. See this Dict. tit. Chancery, Equity.

An appeal from the equity side of this court lies immediately to the house of peers; but from the common law side, in pursuance of the stat. 31 Edw. III. c. 12, a writ of error must be first brought into the court of exchequer-chamber. And from the determination of the judges of the latter, a writ of error to the house of lords. 3 Comm. 44. See this Dict. tit. Decret. Equity, Error.

Some persons think there was an exchequer under the Anglo-Saxon kings; but our best historians are of opinion, that it was erected by King William the First, its model being taken from the transmarine exchequer, established in Normandy long before that time. Madox's Hist. Excheg.

In the reign of Henry the First there was an exchequer, which has continued ever since; and the judges of the court were at that time styled barones scoccarii, and administered justice to the subjects. In ancient times the barons of the exchequer dealt in affairs relating to the state, or public service of the crown and realm: and were greatly concerned in the preservation of the prerogative, as well as the revenue of the crown; for at the exchequer it was the care of the treasurer and barons to see that the rights of the crown were no ways invaded. Lex Constitutionis, 198.

On account of the authority and dignity of the court of exchequer, anciently it was held in the king's palace; and the acts thereof were not to be examined or controlled in any other of the king's ordinary courts of justice: the exchequer was the great repository of records, wherein the records of the other courts at Westminster, &c. were brought to be laid up in the treasury there. And writs of the chancery were sometimes made forth at the exchequer; writs of summons to assemble parliaments, &c. Ibid.

The exchequer has been commonly held at Westminster, the usual place of the king's residence; but it hath been sometimes holden at other places, as the king pleased; as at Winchester, &c. And in the exchequer there are reckoned seven courts, viz. the court of plea, the court of accounts, the court of receipts, the court of the exchequer-chamber, (being the assembly of all the judges of England for difficult matters in law;) the court of exchequer-chamber for errors in the court of exchequer, for errors in the king's bench, and the court of equity in the exchequer-chamber. 4 Inst. 119.

But, according to the usual division for the despatch of all common business, the exchequer is divided (as has been already noticed) into two parts; one whereof is conversant especially in the judicial hearing and deciding of causes pertaining to the prince's coffers, anciently called scacarium computarum; the other is the receipt of the exchequer, which is properly employed in the receiving and payment of money. And it has been observed, that about the time of the conquest, there was very little money in
spee in the realm; for then the tenants of knights' fees answered their lords by military services; and till the reign of King Henry I. the rents or farms due to the king were generally rendered in provisions and necessaries for his household; but in that reign the same were changed into money; and afterwards, in succeeding times, the crown revenue was changed or paid into the exchequer chiefly in gold and silver. Lex Constitutionis, p. 208.

By statute, all sheriffs, bailiffs, &c. are to account in the exchequer before the treasurer and barons: and annual rolls are to be made of the profits of counties, &c. Also inquirors shall be appointed in every county, of debts due to the king. 51 Hen. III. st. 5. 10 Edw. I. stat. Rutl. And all fines of counties for the whole year are to be sent into the exchequer. Stat. de Vicecom. 14 Edw. II. c. 1. Persons impeached in the exchequer may plead in their own discharge; and there shall be writs for discharging persons, &c. 5 Rich. II. c. 10. 14. The officers of the receipt may receive and take for their fees 1d. in the pound for sums issued out, &c. 5 & 6 W. & M. cap. 20.

Officers of the exchequer are without delay to receive money brought thither; and the money on the receipt is to be kept in chests under three different locks and keys, kept by three several officers, &c. 8 & 9 Wm. III. c. 28.

In the court of equity the proceedings are by English bill and answer, agreeable to the practice of the high court of chancery.

In this court the attorney-general brings bills for any matters concerning the king; and any person grieved in any cause prosecuted against him on behalf of the king, may bring his bill against the attorney-general to be relieved in equity, in which case the plaintiff must attend the king's attorney with a copy of the bill, and procure him to answer the same; and Mr. Attorney may call any that are interested in the cause, or any officer or others to instruct him in the making of his answer, so as the king be not prejudiced thereby; and his answer is to be put in without oath. 4 Inst. 109. 112. 118.

The exchequer is now said to be the last of the four courts at Westminster; governed by the chancellor of the exchequer, the lord chief baron, and three other barons, who are the sovereign auditors of England, and the judges of the court. There also sits in this court a cursitor baron, who administers the oath of all high-squires, under-sheriffs, bailiffs, auditors, receivers, collectors, controllers, surveyors, and searchers of all the customs in England.

The chancellor or under treasurer hath the custody of the seal of this court. The king's attorney-general is made privy to all manner of pleas that are not ordinary, and of course, which rise upon the process of the court; and he puts into court in his own name, informations of concealments of customs, seizures, &c. And also for intrusions, wastes, and encroachments, upon any of the king's lands; or upon penal statutes, forfeitures, &c.

The remembrancers keep the records of the court betwixt the king and his subjects, and enter the rules and orders there made; one is called the king's remembrancer, and the other the lord treasurer's remembrancer; the remembrancer for the king hath all
manner of informations upon penal statutes used in his office only; and he calls to account, in open court, all the great accounters of the crown, collectors of customs, &c.; he makes out writs of privilege, enters judgments of pleas; and all matters upon English bill, are remaining in his office.

The remembrancer for the lord treasurer makes out all the estreats; he sets down in his book the debts of all sheriffs, and takes their foreign accounts; and issues out writs and process in many cases, &c. And these remembrancers have several attorneys to do business under them, who, by statute, are not to issue out of the remembrancer's office any writs upon supposition, but upon just grounds, &c. 1 Jac. I. c. 26.

There are two chamberlains that keep the keys of the treasury, where the records lie, with the book of Doomsday, &c. They may sit in court if they please, but not intermeddle with any thing, unless it be relating to the sheriffs, in the pricking whereof they have a vote. See foot, stat. 23 Geo. III. at the end of this article. And, besides the chamberlains, there is a clerk of the pipe, in whose custody are conveyed out of the king's and treasurer's remembrancer, &c. as water through a pipe, all accounts and debts due to the king.

The controller of the pipe, who is said to be the chancellor of the exchequer. The clerk of the estreats, who receives the estreats from the remembrancer's office, and writeth them out to be served for the king, &c. The foreign offerer, who opposes or makes a charge on all sheriffs, &c. of their green wax, i.e. fines, issues, amerciaments, recognition, &c. certified in estreats annexed to the writ, under the seal, in green wax, and delivereth the same to the clerk of the estreats to be put in process. The auditors, that take the accounts of the king's receivers, collectors, &c. and perfect them. The four tellers, whose business to receive and pay all money, is well known. The clerk of the pipe, from his parchment rolls, called pdita receptorum. The clerk of the nihil, who makes a roll of such sums as the sheriff upon process returns nihil, &c. The clerk of the pleas, in whose office all officers and privileged persons are to sue and be sued; and here are divers under clerks employed in suits commenced or depending in this court. There is a clerk of the summons; secondaries in the offices of the remembrancers; secondaries of the pipe; marshal, &c.

By stat. 23 Geo. III. c. 82. the offices of the two chamberlains, the tally-cutter, usher of the exchequer, and the second clerks to each teller, shall, after the death, surrender, forfeiture, or removal of the persons interested in them, be abolished. § 1. 4.

Upon the death, &c. of the two chamberlains, instead of the tally now used to denote the receipt of money, there shall be substituted an indented cheque receipt. § 2. And upon the death, &c. of the usher, the chief officer in each office shall supply his place. § 3.

After the death, &c. of the present auditor, clerk of the pells, either of the four tellers, or two chamberlains, the payment of all salaries, fees, and emoluments to the said officers, shall cease; and in lieu thereof, certain annual salaries are made payable, viz. To the auditor, 4,000l. his chief clerk, 1,000l. clerk of the pells, 3,000l. his first clerk, 1,000l. The four tellers, each 2,700l. Each
of their first clerks, 1,000/. These are to appoint such other clerks and officers as they think fit, to be approved of by the treasury. § 5.

All fees as heretofore (see stat. 26 Geo. III. c. 99.) to be received by the first clerk to the clerk of the pelts; [200 of whose salary is on that account;] two thirds thereof to be applied to the sinking fund, and one third to pay the above salaries. § 9.

The houses of the auditor, four tellers, and usher, shall, after the death, &c. of the present possessors, be vested in his majesty, and not annexed to the offices. § 10. And no office in the receipt of the exchequer may be granted either in possession or reversion, in any other manner than subject to this act. § 11.

The Court of Exchequer-Chamber was first erected by statute 31 Edw. III. c. 12. to determine causes upon writs of error, from the common law side of the court of exchequer. And to that end it consists of the lord chancellor, and lord treasurer, taking unto them the justices of the king’s bench and common pleas. In imitation of which, a second court of exchequer-chamber was erected by stat. 27 Eliz. c. 8. consisting of the justices of the common pleas, and the barons of the exchequer; before whom writs of error may be brought to reverse judgments in certain suits originally begun in the court of king’s bench. See this Dict. tit. Error. 3 Comm. 56.

Into the court also of exchequer-chamber, (which then consists of all the judges of the three superior courts, and sometimes the lord chancellor also,) are sometimes adjourned from the other courts such causes as the judges, upon argument, find to be of great weight and difficulty, before any judgment is given upon them in the court below. 4 Inst. 119. 2 Bulst. 146.

In the above-mentioned court of exchequer-chamber, established under stat. 27 Eliz. c. 8, there are no more than two return-days in every term; one is called the general affirmation day, being appointed by the judges, to be held a few days after the beginning of every term, for the general affirmation or reversal of judgments: the other is the adjournment-day, which is usually held a day or two before the end of every term. On the first of these days judgments are affirmed or reversed, or writs of error non prossed; the intent of the latter is, to finish such matters as were left undone at the former; on which last day also (as well as on the first) judgments may be affirmed or reversed, or writs of error non prossed, on paying a fee extraordinary to the clerk of the errors, and setting down the cause for affirmation two days before the adjournment-day. Impey’s K. B. 678.


Excise.

From the Belg. accissse tributum.] An inland imposition, paid sometimes on the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption.

This is doubtless, (says Blackstone, 1 Comm. 318.) impartially speaking, the most economical way of taxing the subject; the charges of levying, collecting, and managing the excise duties being considerably less in proportion than in other branches of the
revenue. It also renders the commodity cheaper to the consumer than charging it with customs to the same amount would do. But at the same time, the rigour and arbitrary proceedings of excise laws, seem hardly compatible with the temper of a free nation. For the frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary wherever it is established, to give the officers a power of entering and searching the houses of such as deal in excisable commodities, at any hour of the day; and in many cases, of the night likewise. And (for the same reasons) the proceedings in case of transgressions are summary and sudden, to the exclusion of the trial by jury.

Its original establishment was in 1643, when it was introduced by the parliament then in rebellion against King Charles I. Its progress was gradual, being at first laid upon those persons and commodities where it was supposed the hardship would be least perceivable, viz. the makers and vendors of beer, ale, cider, and perry; and was afterwards imposed on such a multitude of commodities, that it might fairly be denominated general.

Upon the restoration of Charles II. it having then been long established, and its produce well known, some part of it was given to the crown by way of purchase for the feodal tenures and other oppressive parts of the hereditary revenue. And notwithstanding the objections eternally raised against it by the interested or the patriotic, it has from time to time been imposed on a vast variety of articles.

By the consolidating act, 43 Geo. III. c. 69. the following articles and matters are subject to a duty of excise in Great Britain; viz. auctions, of lands and good; beer, bricks and tiles; candles, cocoanuts, and coffee; cider and perry; glass, hides and skins; hops, licenses to auctioneers, brewers, wax and tallow-candler makers, grocers, glass-makers, tanners, &c. maltsters, paper-makers, plate, dealers in, calico-printers, &c. soap-makers distillers, rectifiers, dealers in spirits, starch-makers, sweet wine brewers, tobacco-manufacturers and dealers, vinegar makers, wine-retailers, wire-drawers, malt, mead, or mehgegin; paper, printed and stained papers, linens, cottons, and silks; salt, soyl, spirits, starch, sweets, tea, tobacco and snuff; verjuice, vinegar, wines imported, wire. The list is at present somewhat shorter in Ireland, [February, 1808.]

It has been very judiciously observed, that the grievances of the excise exist more, perhaps, in apprehension than in reality. Actions and prosecutions against officers, commissioners, and justices, for misconduct in excise cases, are very rarely heard of in courts of law. It is certainly an evil that a fair dealer cannot have the benefit of any secret improvement in the management of his trade or manufactory; yet it seems more than equivalent to the public at large, that by the survey of the excise, the commodity is preserved from many shameful adulterations; as experience has fully proved since wine was made subject to the excise law.

The excise, like the customs, is necessarily regulated by a multiplicity of statutes; the abridgment of which would form no small volume. See tit. Customs. The following short extracts from Burn's Justice, tit. Excises, where this subject is more fully stated, will convey the information most useful to the student.

One principal head office of excise is to be kept in London, or
within ten miles thereof, to which all other offices in the kingdom shall be subordinate and accountable; which said office shall be managed by such commissioners as the king shall appoint. 5 Wm. c. 20. § 16.

And all the places within the bills of mortality shall be under the immediate care and management of the said head-office; and such and so many subordinate commissioners and sub-commissioners, and other officers, shall be appointed by the king in other places, as he shall think fit. Stat. 12 24 Geo. c. 24. § 48.

The excise office in all places where it shall be appointed, shall be kept open from 8 in the morning till 2 in the afternoon. Stat. 30 Geo. c. 26. § 12.

The commissioners or sub-commissioners shall appoint under their hands and seals, such persons as they shall think needful in each market-town, to be there, upon every market day, in some known and public place, for receiving entries and duties, and performing all other things touching the revenue of excise; and if such office be not so kept in each market town, the commissioners or others neglecting or refusing, shall for every market day forfeit 10l. And such person as shall come to such market town to make his entry or payment, and tender the same accordingly, and be able to prove such tender by oath of one witness, shall not be liable to any penalty for such weekly or monthly entries or payments as should have been made or paid on such market day. Stat. 12 24 Geo. c. 24. § 10.

The kingdom of England and Wales (exclusive of the bills of mortality) is divided into about 50 collections; some called by names of particular counties; others by the names of great towns; where one county is divided into several collections, or where a collection comprehends the contiguous parts of several counties, every collection is subdivided into several districts, within which there is a supervisor; and each district is parcelled into out-rides and foot-walks, within each of which there is a gauger, or surveying officer. Gilb. Exch. Append.

The commissioners or sub-commissioners, in their respective circuits and divisions, shall constitute under their hands and seals such and so many gaugers as they shall find needful. Stat. 12 Geo. 24. § 33.

In order to which, he who would be made a gauger, must procure a certificate that he is above 21 and under 30 years of age; that he understands the four first rules of arithmetic; that he is of the communion of the church of England; how he has been employed, or what business he hath followed; that he is not encumbered with debts; whether single or married; and if married, how many children he has; for if he has above two he cannot (by the rules of the office) be admitted. Gilb. Exch. Append.

He must also nominate two persons to be his sureties; and it must be certified that they are of sufficient ability, and that the said certificate is of his own hand-writing: such certificate, written by him, must be signed by the supervisor of excise where the party applying lives. Id.

At the bottom of his certificate must be his affidavit, that neither he, nor any else to his knowledge, hath directly or indirectly, given or promised to give any treat, fee; gratuity, or reward, for his
obtaining or endeavouring to obtain an order for his being instructed. Id.

When an order for instruction is granted, it is directed to an experienced officer, who receives such person as his pupil; and the like books as officers have, being delivered to such pupil, he goes with and attends the officer who instructs him, and he takes surveys, and in his own book makes the like entries, as if he was an officer, until the instructor certifies that he is fully instructed. Id.

After he is thus certified for, and until he is employed, he is called an expectant, being to wait till a vacancy happens. Id.

No person shall be capable of intermeddling with any office relating to the excise, until he shall, before two justices in the county where his employment shall be, or before a baron of the exchequer, take the oaths of allegiance and supremacy, together with an oath of office, which is to be certified to and recorded by the next quarter sessions. Stat. 13 Car. II. c. 24, § 47, 48. and see stat. 15 Car. II. c. 11. § 57.

The business of the supervisor is to be continually surveying the houses and places of the persons within his district liable to duties: and to observe and see whether the officers duly make their surveys, and make due entries thereof in their books and in their specimen-papers; and every supervisor is in his own book to enter what he himself does each day and part thereof; and also set down the behaviour, good and bad, the diligence or negligence of the several officers of his district: and at the end of every six weeks to draw out a diary of every day's business, and of the remarks made each day of the several officers in his district, and to transmit such diary at the end of every six weeks to the chief office. Gilb. Exch. Attest.

Each commissioner takes and peruses a proportion of these diaries; and when he meets with any remarkable complaint against any officer, he communicates it to the rest, who thereupon come to an agreement, either to admonish, reprimand, reduce, or discharge. For small faults, officers are admonished; for great ones, reprimanded; for greater, reduced; but for the greatest, discharged. The commissioner who peruses the dairy writes in the margin, admonish, reprimand, or as the case is. Id.

These diaries, after having been thus written upon are delivered to the clerk of the diaries, who in a book, called the reprimand-book, places the admonitions, reprimands, and the like, to each officer's account, and writes every offender word thereof. Which reprimand-book is resorted to upon discovering new faults; and if it is there found that the officer has before been admonished and reprimanded so often that there are no hopes of his amending, he is then discharged. The said book is likewise resorted to when application is made for advancing or preferring an officer into a better post. Frequent admonitions or reprimands are a bar to preferment, unless they are of old standing; but if for three years last he stands pretty clear of admonitions and reprimands, those of elder date are not much regarded. Id.

The collector's business is, every six weeks, to go his rounds, and in the intervals of rounds, he is to be assisting in prosecuting offenders before the justices; he is also to peruse the supervisor's diaries; and where he finds an officer complained of, is to ex-
amine him and the supervisor, and having heard both, is in the margin to write his opinion of each fact; he is also to have an eye how the supervisors and officers of his collection perform their duties, and from the vouchers he transcribes into his book the charge on each particular person in his collection. *Id.*

For faults, gaugers are reduced, either to be only assistants, or from foot-walks to out-rides; supervisors are reduced to be again only gaugers; and collectors are reduced to be supervisors. *Id.*

In some instances discharged officers, after having for a competent time been thereby kept out of pay, are again restored; but if twice discharged, are never again restored, unless one of the discharges appears to have been occasioned by a misrepresentation of the case. *Id.*

**EXCLUSAGIUM, EXCLUSAGIUM,** A sluice for the carrying off water; and the payment to the lord for the benefit of such a sluice. *Et duo molendina in eodem maneria cum aquis exclusagiis, &c.* Mon. Angl. tom. 1. p. 398. 587.

**EXCOMMENGERMENT; Lux French.] Excommunication. Stat. 23 Hen. VIII. c. 3.**

**EXCOMMUNICATION, excommunicat*.* An ecclesiastical censure, divided into the greater and the lesser; by the latter a person is excluded from the communion of the church only; by the former, from that communion, and also from the company of the faithful; and incapacitated from performing any legal act.

The sentence of excommunication was instituted originally for preserving the purity of the church; but ecclesiastics did not scruple to convert it into an engine for promoting their own power, and inflicted it on the most frivolous occasions. *Roberts. Hist. Emp. Charles V. vol. 2. 109. &c.*

If the judge of any spiritual court excommunicates a man for a cause of which he hath not the legal cognisance, the party may have an action against him at common law; and he is also liable to be indicted at the suit of the king. *1 Inst. 134. 2 Inst. 527. 623.*

An excommunicated person is disabled to do any act that is required to be done by one that is *probus et legalis homo.* He cannot serve upon juries, cannot be a witness in any court, and which is the worst of all, cannot bring an action either real or personal, to recover lands or money due to him. *Litt. § 201.* And on forty days’ contumacy, the defendant is liable to be taken on a writ of *excommunication capitando,* and imprisoned till he is reconciled to the church, when he may be freed by a writ of *excommunication deliberando.* *2 Inst. 189. 6 Rep. 58. See more fully those tilities, post.* In case of subtraction of tithes, a more summary and expeditious assistance is given by the statutes *27 Hen. VIII. c. 20. 3 Hen. VIII. c. 7,* which enact, that on complaint by the ecclesiastical judge of any contempt or misbehaviour of a defendant, in any suit for *tithes,* any privy councillor, or any two justices of the peace, (or in case of disobedience to a definitive sentence any two justices of the peace,) may commit the party to prison without bail or mainprize, till he enters into a recognisance with sufficient sureties to give a due obedience to the process and sentence of the court.
EXCOMMUNICATION.

As to pleading excommunication in a plaintiff, see tit. Abatement I. 2. b.

We may next proceed to consider more particularly,

I. In what Cases, and by whom, Persons may be excommunicated.
II. Of the Proceedings in Excommunication: and how the Excommunicated are absolved.

Excommunication is generally for contempt in not appearing, or not obeying a decree, &c. And in other respects the causes of it are many; as for matters of heresy, refusing to receive the sacrament, or to come to church; incontinency, adultery, simony, &c. A man may not be excommunicated for matter of defamation, &c.

In some cases persons incur excommunication ipso facto by act of parliament; but they are first to be convicted of the offence by law, and the conviction is transmitted to the ordinary. Dyce, 275. 1 Venr. 146.

By stat. 5 & 6 Edw. VI. c. 4. "if any person shall smite; or lay violent hands upon any other, either in any church or churchyard, then ipso facto every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation."

And it is further enacted by the said statute, "that if any person shall maliciously strike any person with any weapon in any church or church-yard, or shall draw any weapon in any church or churchyard, to the intent to strike another with the same weapon, then every person so offending shall stand ipso facto excommunicated as aforesaid." See tit. Church.

By the stat. 3 Jac. I. cap. 5. § 11 & 12. it is enacted, "that every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated." See this Dict. tit. Papist.

None but the bishop is to certify excommunication, unless the bishop be beyond sea, or in remotis; or except the certificate be by one that hath ordinary jurisdiction, &c.

Anno 37 Hen. III. The archbishop of Canterbury, and the other bishops, with burning tapers in their hands, in Westminster-Hall, before the king and the other estates of the realm, denounced a curse and excommunication against the breakers of the liberty of the church; and by stat. 9 Edw. III. bishops may excommunicate, not only all perturbers of the peace of the church, but also felons, and other offenders, &c. And by the ecclesiastical laws, excommunicated persons are not permitted to have Christian burial.

The bishop's certificate, if he die before the return of the writ, shall not be received, for his successor shall certify; the signification must mention that the party lived within the diocese where he was excommunicated, and by what bishop; if it be pleaded, the time when is to be shown; and excommunication must be declared in the ecclesiastical court before they proceed, &c. 8 Rep. 68. Cro. Jac. 82. Moor's Cases, 667. Latch. 174. Hetley, 86. See this Dict. tit. Abatement I. 2. 6.

It is not necessary that the party should be resident in the dio-
cese at the time of the excommunication; it is sufficient if he were there at the time of the citation. 7 Term Rep. K. B. 153.

It hath been adjudged that the spiritual court hath not power to meddle with the body of any persons whatsoever, or to send process to take them; for if a person is excommunicated for contempts, &c. they ought to certify it into the chancery, whence it is sent into B. R. and thence issues process. Cro. Eliz. 741. See post, tit. Excommunicato Capiendo.

If a person be unjustly excommunicated for a matter of which the spiritual court hath not consance, and he is taken on a writ of excommunicato capiendo, the party grieved shall have a writ out of chancery to the sheriff, to deliver him out of prison. 2 Inst. 623. 12 Co. 76. Fitz. N. B. 141.

So if the spiritual court proceeds inverso ordine; as if they refuse a copy of the libel, &c. a prohibition shall go with a clause to absolve and deliver the party injured. 1 Sid. 252.

Also if a man be excommunicated, and offers to obey and perform the sentence, and the bishop refuseeth to accept it, and to assuoi him, he shall have a writ to the bishop, requiring him, upon performance of the sentence, to assuoi him; and the reason thereof is, for that if the excommunication the party is disabled to sue any action, or to have any remedy for any wrong done unto him, so long as he shall remain excommunicate; and also the party grieved may have his action upon his case against the bishop, in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to the ecclesiastical consance; also the bishop, in those cases, may be indicted at the suit of the king. 2 Inst. 623.

But if the excommunication be for a just cause, the party must make present satisfaction before he can be absolved, or he must put in caution, that he will hereafter perform that which the bishop shall reasonably and according to law enjoin him; which caution, in the civil law, is of three sorts: 1. Fidejussoria, as when a man bindeth himself with sureties to perform somewhat. 2. Pignoratio, or reeia cautio, as when a man engageth goods or mortgageh lands for the performance. 3. Juratoria, when the party who is to perform any thing taketh a corporal oath to do it, which last is now the most frequent method.

This method of taking caution was held to be against law. 1 Bulst. 122. But was afterwards, on great debate, held to be good; and that the bishop having a discretionary power herein, it was as much in his option to take caution by obligation as by either of the two other methods. 2 Lev. 36. Raym. 225.

If the sentence of the greater instead of the lesser excommunication be pronounced, it is only a ground of appeal: the court of K. B. will not quash the writ de excom. cap. for that objection. 7 Term Rep. 153.

If after a person is excommunicated, there comes a general act of pardon, which pardons all contempts &c. it seems that this offence is taken away without any formal absolution. See Cro. Car. 199. Cro. Jac. 213. 8 Co. 66. 1 Jones, 227. 2 Lev. 36. Gibb. Cod. 1110.

EXCOMMUNICATO CAPIENDO. A writ directed to the sheriff for apprehending him who stands obstinately excommunic-
cated. If within forty days after sentence of excommunication has been published in the church, the offender does not submit and abide by the sentence of the spiritual court, the bishop may signify, i.e. certify, such contempt to the king in chancery. Upon which there issues out this writ to the sheriff of the county, called, from the bishop's certificate, a significavit: or, from its effect, a writ de excommunicato capiendo. And the sheriff shall thereupon take the offender and imprison him in the county gaol till he is reconciled to the church, and such reconciliation certified by the bishop. Fitz. N. B. 62. By the stat. 5 Eliz. c. 23. writs de excommunicato capiendo shall issue out of the court of chancery in term time, and be returnable in B. R. &c. They shall be brought sealed into the king's bench, and there opened and delivered of record to the sheriff, and there must be twenty days between the testè and the return: and if the sheriff return a non est inventus on the writ, a capias with proclamation is to be granted for the party to yield his body to gaol under the penalty of 10l. And if he do not appear on the first capias and proclamation, a second is to go forth, and he is to forfeit 20l. &c.

But, by this statute, if in the excommunicato capiendo, the party excommunicated hath not a sufficient addition, as to his place of dwelling, &c. according to 1 Hen. V. c. 5. or if in the significavit it is contained, that the excommunication proceeds upon a cause of contempt, or some original matter of heresy; for refusing to have a child baptized, to receive the sacrament, to come to divine service, or for error in matters of religion and doctrine, for incontinency, usury, simony, perjury in the ecclesiastical courts, or idolatry; he shall not incur the penalties in this act for his contempt, in not rendering himself prisoner upon the capias, &c. So that the statute doth not require the capias with proclamations, and the penalties in other cases besides the ten cases mentioned. 2 Inst. 661.

And it has been adjudged, where a person has been excommunicated, and none of those causes were contained in the significavit, that the person excommunicate should be discharged of the penalties, but not of the excommunication. 3 Mod. 89. It has also been held, that for any of the causes expressed in the statute there ought to go a capias with a penalty, and be an addition to the writ: in other cases it is not necessary; and if then the capias be with a penalty, the court will not discharge the party, but the penalty only: but for want of addition, in cases where that is required, the party shall be discharged upon motion. 1 Salk. 294, 295.

A writ de excom. capi. stating that the defendant was excommunicated in a cause of defamation and slander merely spiritual, is good. 7 Term Rep. K. B. 153.

EXCOMMUNICATO DELIBERANDO, A writ to the sheriff for delivery of an excommunicate person out of prison, upon certificate from the ordinary of his conformity to the ecclesiastical jurisdiction. Fitz. N. B. 63. Reg. Orig. 67. And where a man is unduly excommunicated, he may be delivered, in some cases, by a habeas corpus; and sometimes by pleading, as well as by an excommunicato deliberando: also sometimes by prohibition, &c. And on a general pardon, the party may have a writ to the bishop to ab-
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solve him. 12 Rep. 76. Latch. 205. Godb. 272. If a plaintiff in an action be excommunicate, and after he gets letters of absolution, on showing them in court, he may have a resummons, &c. upon his original. 1 Inst. 133.

EXCOMMUNICATO RECIPENDO, or rather recaipiendo.] A writ whereby persons excommunicated being for their obstinacy committed to prison, and unlawfully delivered, before they have given caution to obey the authority of the church, are commanded to be sought after, retaken, and imprisoned again. Reg. Orig. 57. If a person after his commitment escapes, and the sheriff has not returned his writ, a cautias excommunicatum de novo shall go, otherwise if the writ be returned. Mod. Cas. 76.

EXECUTION, execution.] Signifies the last performance of an act, as of a judgment, &c. It is the obtaining possession of any thing recovered by judgment of law. 1 Inst. 289.

Sir Edward Coke, in his Reports, makes two sorts of executions; one final, another with a quousque, tending to an end: an execution finalis that which makes money of the defendant's goods, or extends his lands, and delivers them to the plaintiff, which he accepts in satisfaction, and is the end of the suit, and all that the king's writ requires to be done; the other writ with a quousque, though it tendeth to an end, is not final: as in case of a cautias ad satisfaciendum, which is not a final execution, but the body of the party is to be taken, to the intent the plaintiff be satisfied his debt, &c. and the imprisonment of the defendant not being absolute, but until he do satisfy the same. 6 Rep. 37.

EXECUTION. In the usual legal sense of the word, is a judicial writ grounded on the judgment of the court from whence it issues: and is supposed to be granted by the court at the request of the party at whose suit it is issued, to give him satisfaction on the judgment which he hath obtained; and therefore an execution cannot be sued out in one court, upon a judgment obtained in another. Impey's K. B.

This execution, or putting the law in force, is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

If the plaintiff recovers in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be a habere facias seizinum, or writ of seisin of a freehold; or a habere facias possessionem, or writ of possession of a chattel interest. Finch's L. 470. See this Dict. those titles. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered, in the execution of which the sheriff may take with him the posse comitatus, or power of the county, and may justify breaking open doors, if the possession be not quietly delivered. See positi, III. 3. But if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of a door, in the name of seisin, is sufficient execution of the writ. 3 Comm. 412.

Upon a presentation to a benefice recovered in a quare inpedit, or assise of darrein presentment, the execution is by a writ de clerico admitendo; directed not to the sheriff, but to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff. See fit. Admittendo Clerico, Adwovson.
In other actions, where the judgment is that something special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. As upon an assise of nuisance, or quod peremptat proternere, where one part of the judgment is that the nuisance be removed, a writ goes to the sheriff to abate it at the charge of the party, which likewise issues in case of an indictment. Comb. 10. See tit. Nuisance.

Upon a replevin, the writ of execution is the writ de retorno habende; to have a return of the cattle distrained; and if the distress be eloigned, the defendant shall have a capias in withernam; but on the plaintiff’s tendering the damages, and submitting to a fine, the process in withernam shall be stayed. 2 Leon. 174. See tit. Replevin, Distress, Withernam. In detinue, after judgment, the plaintiff shall have a distinguishing to compel the defendant to deliver the goods by repeated distresses of his chattels. 1 Roll. Abr. 737. Rast. Enni. 215.) or else a scripture against any third person in whose hands they may happen to be, to show cause why they should not be delivered; and if the defendant still continues obstinate, then (if the judgment be by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff’s damages; which (being either so assessed, or by the verdict in case of an issue, Bro. Abr. tit. Damages, 29.) shall be levied on the person or goods of the defendant. See tit. Detinue. So that after all, in replevin and detinue, the only actions for recovering the specific possession of personal chattels, if the wrongdoer be very perverse, he cannot be compelled to the restitution of the identical thing taken or detained; but he has still his election to deliver the goods or their value. Keilw. 64.

Executions, in actions where money only is recovered, as a debt or damages, are of five sorts; 1. Against the body of the defendant; 2. Against his goods and chattels; 3. Against his goods and the profits of his lands; 4. Against his goods and the possession of his lands; 5. Against all three, his body, lands, and goods.

1. The first of these species of execution is by writ of capias ad satisfacendum, (shortly called a ca. sa.) to take and imprison the body of the debtor till satisfaction be made for the debt, costs and damages. See this Dict. tit. Capias. Sir Edward Coke gives a singular instance where a defendant in 14 Edw. III. was discharged from a capias, because he was of so advanced an age that he could not undergo the pain of imprisonment. 1 Inst. 389. This writ is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and therefore when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only by stat. 21 Jac. I. c. 24. if the defendant dies while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels.

If a ca. sa. is sued out, and a noster inventus is returned thereon, the plaintiff may sue out a process against the bail, if any were given; who stipulate in this triple alternative, that the defendant shall, if condemned in the suit, satisfy the plaintiff his debt and costs, or surrender himself a prisoner, or that they will pay it for
him: as therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place. *Lutw.* 1269. 1275. In order to which a writ of *scire facias* may be sued out against the bail, commanding him to show cause why the plaintiff should not have execution against them for his debt and damages; and on such writ, if they show no sufficient cause, or the defendant does not surrender himself on the day of the return, or of showing cause, the plaintiff may have judgment against the bail, and take out a writ of *ca. se.* or other process of execution against them. See tit. *Bail, Scire Facias; and post, II.*

2. The next species of execution is against the goods and chattels of the defendant, and is called a writ of *fieri facias,* from the words in it where the sheriff is commanded that he *cause to be made* of the goods and chattels of the defendant, the sum or debt recovered. This lies as well against privileged persons, peers, &c. as other common persons; and against executors or administrators, with regard to the goods of the deceased. The sheriff may not break open any outer doors to execute either this writ or the writ of *ca. se.* but must enter peaceably, and may then break open any inner door belonging to the defendant, in order to take the goods. § *Rej.* 92. *Palm.* 54. See *post, III. 3.* And the sheriff may sell the goods and chattels of the defendant, even an estate for years, which is a chattel real, (§ *Rej.* 171.) till he has raised enough to satisfy the judgment and costs; first paying the landlord of the premises upon which the goods are found the arrears of rent then due, not exceeding one year's rent in the whole. Stat. 8 *Ann.* c. 14. See tit. *Distress, Rent.* If part only of the debt be levied on a *fieri facias,* the plaintiff may have a *ca. se.* for the residuum. 1 *Rey.* 904. *Cro. Eliz.* 344. See further this *Dict.* tit. *Fieri Facias, Venditioni Ecclesias.*

3. A third species of execution is by writ of *levari facias,* which affects a man's goods and the *profits* of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant, whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. *Finch's L.* 471. Little use is now made of this writ; the remedy by *eligit,* which takes possession of the lands themselves, being much more effectual. But, as a species of this *levari facias* may be considered a writ of execution proper only to ecclesiastics, which is given when the sheriff, upon a common writ of execution sued, returns that the defendant is a beneficed clerk, having no lay fee. In this case a writ goes to the bishop of the diocese, in the nature of a *levari* or *fieri facias,* to levy the debt and damages *de bonis ecclesiasticis,* which are not to be touched by lay hands; and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice, directed to the churchwardens to collect the same, and pay them to the plaintiff till the full sum be raised. *Reg. Orig.* 300. *Burn's E. L.* 329. 2 *Inst.* 472. *Jenk.* 207. See further, tit *Levati Facias.*

4. The fourth species of execution is by the writ of *eligit,* which is a judicial writ given by stat. *West.* 2. 13 *Edw.* I. c. 18 either upon judgment for a debt or damages, or upon the forfeiture of a recognisance taken in the king's court. By the common law, a man could only have satisfaction of goods, chattels, and the
present profits of lands, by the two writs of execution last mentioned, (2 and 3.) but not the possession of the lands themselves, which was a natural consequence of the feudal principles prohibiting alienation of lands. See this Dict. tit. Tenure.

By this writ of elegit, the defendant’s goods and chattels are not sold; but only appraised; and all of them, except oxen and beasts of the plough, are delivered to the plaintiff at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety, or one half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or any other in trust for him, are also to be delivered to the plaintiff; to hold till out of the rents and profits thereof the debt be levied, or till the defendant’s interest be expired; as till the death of the defendant, if he be tenant for life, or in tail. 2 Inst. 395. Stat. 29 Car. II. c. 3.

It is upon feudal principles also, that copyhold lands are not liable to be taken in execution upon a judgment. 1 Roll. Abr. 888. But in case of a debt to the king, it appears by Magna Charta, c. 8, that it was allowed by the common law for him to take possession of the lands till the debt was paid.

This execution, or seizing of lands by elegit, is of so high a nature, that after it the body of the defendant cannot be taken: but if execution can only be had of the goods because there are no lands, and such goods are not sufficient to pay the debt, a ca. sa. may then be had after the elegit; for such elegit is in this case no more in effect than a fieri facias. Hob. 58.

Thus it appears that body and goods may be taken in execution, or land and goods; but not body and land too upon any judgment between subject and subject, in the course of the common law; but,

5. Upon some prosecutions given by statute; as in the case of recognisances or debts acknowledged on statute merchant, or statute staple; (pursuant to statute 13 Edw. I. De Mercatoribus; 27 Edw. III. c. 9. see this Dict. those titles;) upon forfeiture of these, the body, lands and goods, may all be taken at once in execution to compel the payment of the debt. The process hereon is usually called an extent or extendi facias; because the sheriff is to cause the lands, &c. to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied. Fitz. N. B. 131. See this Dict. tit. Extent.

By stat. 33 Hen. VIII. c. 39, all obligations made to the king shall have the same force, and of consequence the same remedy to recover them, as a statute-staple; though indeed before this statute, the king was entitled to sue out execution against the body, lands and goods of his accountant or debtor. 3 Rep. 12. And his debt shall, in suing out execution, be preferred to that of every other creditor who hath not obtained judgment before the king commenced his suit. Stat. 33 Hen. VIII. c. 39. § 74.

The king’s judgment also affects lands which the king’s debtor hath at or after the time of contracting his debt, or which any of his officers mentioned in stat. 13 Eliz. c. 4. hath at or after the time of his entering on the office: so that if such officer of the crown aliens for a valuable consideration, the land shall be liable
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to the king’s debt, even in the hands of a bonâ fide purchaser; though the debt due to the king was contracted by the vendor many years after the alienation. 10 Repl. 55, 56. 8 Repl. 171. And see stat. 25 Geo. III. c. 35, which enables the court of exchequer, on application by the attorney-general by motion, to order the estate of any debtor to the king, and of the heirs and assigns of such debtor, in any lands extended, to be sold as the court shall direct; the conveyance to be made by the remembrancer of the court, by bargain and sale, to be enrolled in that court.

Judgments between subject and subject related, even at common law, no farther back than the first day of the term in which they were recovered, in respect of the lands of the debtor; and did not bind his goods and chattels but from the date of the writ of execution; and now by the statute of frauds, 29 Car. II. c. 3, the judgment shall not bind the land in the hands of a bonâ fide purchaser, but only from the day of actually signing the same, which is directed by the statute to be punctually entered on the record: nor shall the writ of execution bind the goods in the hands of a stranger or a purchaser, (Skin. 257.) but only from the actual delivery of the writ to the sheriff or other officer, who is therefore ordered to endorse on the back of it the day of his receiving the same. See further, this Dict. tit. Judgment; and as to the prerogative of the crown, post, IV. 2. and on the subject in general, 3 Comm. c. 26.

The reader may now pursue his inquiries under the following divisions:

I. Of the Nature and several Kinds of Executions, and what Things were liable thereto at Common Law, &c.

II. Of the Judgments on which the several Executions may be taken out, and where the Party shall be concluded by the Election of one of them, &c.

III. 1. By whom, against whom; 2. At what Time Executions may be sued; 3. By whom, and how they shall be executed; 4. How they are to be released and discharged.

IV. 1. To what Time Executions shall relate, so as to avoid Alienation; 2. Of the King’s Prerogative, in respect of Executions.

V. 1. Of the Party’s Remedy against irregular Executions; 2. Of the Offence of obstructing Executions.

I. The writs of execution at common law were only a fieri facias on the goods and chattels, and a levare facias to levy the debt or damages upon the land and chattels: The ca. sa. was given by construction of the statute 25 Edw. III. c. 17, and the elegit, by stat. West. 2. c. 18, which makes the body liable, and the future profits of lands, &c. 1 Inst. 154. 2 Inst. 394.

The reason why by the common law, where a subject had execution for debt or damages, he could not have the body of the defendant, or his lands, in execution, (unless it were in special cases,) was, that the defendant’s body might be at liberty, not only to follow his own affairs and business, but also to serve his king and country; and taking away the possession of his lands would hinder the following of his husbandry and tillage. 2 Inst. 394.
Though neither the body nor lands of the debtor on a judgment could be taken in execution at common law, but only his goods; yet in action of debt against an heir, upon the bond of his ancestor, his land which he had by descent was subject to be taken in execution. 3 Rep. 11. In action of debt against the heir upon his ancestor's bond, there was judgment by nihil dicit: and it was held that the plaintiff should have execution against the heir, of any of his own lands or goods. Dyer, 89. 149. Judgment was had against the heir by nil dicit, and a scire facias being brought against him to have execution, he pleaded rios fier descent; it was adjudged that this plea was too late after the judgment by nil dicit, and the execution shall be on his own lands. Dyer, 344.

But there is a difference between a scire facias and an action of debt brought against an heir upon a bond of his ancestor, in which the heir is named. Poph. 193. On a judgment for the debt of an ancestor, where the heir hath made over lands descended to him, execution may be taken against such heir to the value of the land, &c. for the debt of his ancestor, as if it were his own debt. Stat. 3 & 4 W. & M. c. 14. § 5. See lit. Fraud.

If a person have judgment given against him for debt or damages, or be bound in a recognisance, and dieth, and his heir be within age, no execution shall be sued of the land during the minority; and against an heir within age, no execution shall be sued upon a statute-merchant or staple, &c. 1 Inst. 290.

No execution for damages recovered in a real action, shall be had by captus ad satisfaciendum; but where a man hath judgment to recover lands and damages, he may have execution of both together. 8 Rep. 141.

Whatever may be assigned or granted may be taken on an execution. Nothing can be taken in execution that cannot be sold, as deeds, writings, &c. Bank notes, &c. cannot be taken in execution; as they remain, in some measure, choses in action. Hardw. 55.

If there are chattels sufficient, the sheriff ought not to take the lands; nor may things fixed to the freehold, goods bought bona fide, goods pawned, &c. be taken in execution. 8 Rep. 143. And if a defendant hides his goods in secret places, so that the plaintiff cannot take them in execution, it is said no action will lie against him. 5 Rep. 92, 93.

The sheriff cannot take the goods of a stranger, for he is to take the goods of the party only at his peril. And if a bailiff on a fi. fa. against the goods of A. take those of B., an action of trespass lies against the sheriff. Doug. 49. If on execution against one of two partners, the partnership effects be taken and sold, the court will order the sheriff to pay over to the other, a share of the produce, proportioned to his share in the partnership effects, to be ascertained by the master. Doug. 650. Eddie v. Davidson.

If the plaintiff cannot find sufficient effects to satisfy his judgment, the court will order the sheriff to retain for his use money which he has levied in an action at the suit of the defendant. Doug. 231. But money, the surplus of a former execution against the defendant's goods, was refused to be stayed in the hands of a former sheriff, for the purpose of satisfying another execution at the suit of the same plaintiff against the same defendant, who had no
other effects on which the sheriff in office could levy. *Fieldhouse v. Croft*, 4 East's Ref. 510.

See further, *Com. Dig. ut. Execution, (C. 4.)*

II. When a judgment is signed, execution may be taken out immediately upon it, and need not be delayed till it is entered, it being a perfect judgment of the court before entered. *Co. Litt. 505.* And if the judges of the court of *B. R.* see one against whom there is a judgment of that court, walk in Westminster Hall, they may send an officer to take him up, if the plaintiff desire it, without a writ of execution. *7 Mod. 52.* If execution be not sued *within a year and a day* after judgment, where there is no fault in the defendant, as if writ of error be not brought, &c. there must be a *scire facias* to revive the judgment, which, in that time, may be had without moving the court; but if it be of longer standing, the court is to be moved for it. *1 Inst. 290. 2 Inst. 771.* But if the defendant be outlawed after judgment, (as he may where he cannot be taken in execution, or hath no lands or goods to pay the debt, &c. when the suit is commenced by original,) the plaintiff need not renew the judgment by *scire facias* to obtain execution after a year. *1 Inst. 290.

It hath been adjudged that, by the common law, if a man was outlawed after judgment in debt, the plaintiff was at the end of his suit, and he could have no other process after that personally, but was put to his new original, &c. *2 Nels. Abr. 772.* If one be arrested upon process in *B. R.* and puts in bail, and afterwards the plaintiff recovers, and the defendant renders not himself according to law, in safeguard of his bail, the plaintiff may, at his election, take execution against the principal, or his bail, after judgment against them; but if he takes the bail, he shall never afterwards meddle with the principal. *Cro. Jac. 320.*

If one recovers jointly against two in debt, the execution must be joint against them: the court cannot divide an execution which is entire, and grounded on the judgment. *Mich. 24 Car. B. R.*

A man and his wife recovered in an action of debt against the defendant 100l. and damages; then the wife died, and the husband prayed to have execution upon this judgment: the court at first inclined, that it should not survive to the husband, but that administration ought to be committed of it, as a thing in action; but at last they agreed that the husband might take out execution, for that by the judgment it became his debt due to him in his own right. *Cro. Car. 608. 1 Mod. Rep. 179, 180.* See tit. *Baron and Feme.*

If judgment be against two, on the death of one the plaintiff shall have execution by *scire facias* against the survivor; and though he pleads that the other defendant has an heir alive, &c. it will not prevent it. *Raym. 26.* And where two persons recover in debt, and before execution one of them dies; it has been held that execution may be sued in both their names by the survivor, and it will be no error; which may be done without a *scire facias.* *Noy. 150.* An execution may be executed after the death of the defendant; for his executor being privy, is bound as well as the testator; and where execution is once begun, it cannot be delayed,
EXECUTION III. 1.

unless there appears irregularity; and *audita querela* is no *superest deas* to it, nor shall any thing stop the sheriff from selling; &c. *Cro. Eliz.* 73. *Comb.* 33. 389.

Though a man can have but one execution; yet it must be intended an *execution with satisfaction*, and the body of the defendant is no satisfaction, only a pledge for the debt. *5 Rep.* 486. When therefore a person dies in execution, it is without satisfaction; so that the plaintiff may have a *fieri facias* against the goods, or *elegit* against the lands. This was not so at common law; *Hob.* 57, but it is given by stat. 21 *Jac.* I. c. 24. Where a person however was taken on a *cafiás utlagatum*, and died in prison, the plaintiff having chosen this execution, which is the highest in law, it has been held that the defendant dying, the law will adjudge it a satisfaction. *Cro. Eliz.* 830.

If an execution be executed and filed, the party can have no other execution upon that judgment; because there can be but one execution with satisfaction upon one judgment: but if the execution be not returned and filed, another execution may be had: and if only part of the debt be levied on a *fieri facias*, another writ of execution may be sued out for the residue thereof. *1 Lill. Abr.* 565. If one take out any writs of execution, and they have no effect, he may have other writs on their failure. *Hob.* 57.

In case any prisoner committed in execution shall escape, any creditor, at whose suit he stands charged, may retake him by a new *cafiás ad satisfacientium*, or sue forth any other kind of execution, as if the body of such prisoner had never been taken in execution. *Stat.* 8 & 9 *Wm.* III. c. 27. See tit. *Escafé*. Where two are bound jointly and severally, and judgment is had against both of them, if one in execution escapes, the creditor may take out execution against the other; but if he go by license of the creditor, then the other will be discharged. *Cros. Car.* 53. If one in execution be delivered by privilege of parliament, when the privilege ceases, the plaintiff may sue out a new execution against him. *Stat.* 1 *Jac.* I. c. 13.

See stat. 41 *Gco.* III. (U. K.) c. 90. by which it is provided, that where in any suit between party and party in England, any order shall be made for payment of money by the court of chancery, a copy thereof shall be certified into the court of chancery in Ireland, and enrolled there, and process issued thereon: and so *vice versa*, on order of the court of chancery of Ireland, which shall, in like manner, be enforced and executed in England. § 5, 6.

III. 1. No person is entitled to, or can sue out execution, who is not privy to the judgment, or entitled to the thing recovered, as heir, executor, or administrator to him who has judgment. *1 Roll. Abr.* 889.

If one have judgment to recover lands, and die before execution, his heir shall have it; and where tenant in tail recovers and dies before the execution without issue, he in remainder may sue out execution; an heir is to have execution for lands, and the executor or administrator for damages. *Co. Litt.* 251. *Dyer,* 26. The executors of executors may sue out execution of a judgment; but an administrator getting judgment in behalf of the intestate, and then dying, neither his executor or administrator shall take
out the execution, but the administrator de bonis non administratis of the first intestate. 5 Rep. 9. And see stat. 17 Car. II. c. 8.

But if an administrator, durante minori aetate of an executor, recovers in debt, and before execution the executor comes of age, he shall have a *scire facias* on this judgment; for carrying on the suit in right of the executor, made the executor privy thereto.

1 Roll. Abr. 888, 889.

After interlocutory judgment against a woman upon a contract, she marries, yet the plaintiff may proceed to judgment and execution against her without joining the husband by *scire facias*. And a *cautias ad satisfactendum* against her, following the judgment, is at all events regular, though the plaintiff had notice of the marriage before. 4 East's Rep. 521.

If a man has judgment for the arrears of rent, and dies, his executor shall sue out execution, and not the heir; for by the recovery it becomes a chattel vested, to which the executor is entitled. 1 Roll. Abr. 880.

If a statute be entered into, to husband and wife, and the husband dies, the wife shall take out execution. 1 Roll. Abr. 889. So if husband and wife recover lands and damages, and the husband dies, the wife shall have execution of the damages, and not the executors of the husband. 1 Roll. Abr. 342. 889, 890. See tit. Baron and Feme.

If there be judgment in debt against two, and one dies, a *scire facias* lies against the other alone, reciting the death: and he cannot plead that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at common law, the charge upon a judgment being personal, survived, and the stat. of Westm. 2. that gives the *elegit*, does not take away the remedy of the plaintiff at common law; and therefore the party may take out his execution which way he pleases; for the words of the statute are, *sit in electione*; but if he should, after the allowance of this writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querela*. Raym. 26. 1 Lev. 30. 1 Keb. 92. 123. S. C.

By the common law, if judgment be given against a man for debt or damages, and the defendant dies before execution sued, his heir within age is not liable to execution during his minority; but the *parol must demur* (i.e. the plea must stand still) in such case till he comes of age. Co. Litt. 290 a. 1 Roll. Abr. 140.

And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment: as if there be father and two daughters, and judgment be given for debt against the father, who dies, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution. Co. Litt. 290 a.

There can be no execution taken out against a member of parliament during privilege of parliament; also no *cautias* can issue against a peer; for even in the case of a private person at common law, the body was not liable to creditors; and the stat. of Edw. III. which subjects the body, does not extend to peers, because their persons are sacred: the law also supposes, that per-
sons thus distinguished by the king, have wherewithal otherwise to satisfy their creditors. 6 Co. 52. Hob. 61. Cro. Car. 205.

A *capias ad satisfaciendum* may be executed upon a prisoner in prison for felony; and if he be acquitted of the felony, the sheriff is to keep him. 1 Lill. Abr. 557. But where a person is in prison for criminal matters, he ought not to be charged with a civil action without leave of the court; yet if he be charged, he shall not be discharged. Raym. 58. See 7 Mod. 133. and this Dic. tit. Prisoner.

A *ca. sa.* will lie against a man who is outlawed for felony, and he may be taken in execution at the suit of a common person. Owen, 69. And if he was taken upon a *capias utiagat*, which was at the king's suit, he shall be in execution at the suit of the party, if he will. 7 Moor, 556. But this is not without prayer of the party: and if after a judgment given, the judges, of their own heads, or at the request of any person, without prayer of the plaintiff, commit the defendant to prison; by this he shall not be said to be in execution for the plaintiff. Dyer, 297. If one arrested be in prison for debt, and judgment is had against him; though it be in arrest on a *latitat* or *capias*, he shall not be in execution upon the judgment, unless the plaintiff prays it of record, or sues a *capias ad satisfaciendum*, and delivers it to the sheriff. Dyer, 197. 305. Jenk. Cent. 165.

2. At common law, in real actions, where land was recovered, the demandant, after the year, might take out a *seire facias* to revive his judgment; because the judgment being particular in the real action, *quod* the lands with a certain description, the law required that the execution of that judgment should be entered upon the roll, that it might be seen whether execution was delivered of the same thing of which judgment was given: a *seire facias* issused to show cause why execution should not be. 2 Inst. 471. 5 Co. 88. Cro. Eliz. 416. 6 Mod. 288.

But if the plaintiff, after he had obtained judgment in any personal action, had lain quiet, and had taken no process of execution within the year, he was put to a new original upon his judgment, and no *seire facias* was issuable at law on the judgment, because there was not a judgment for any particular thing in the personal action, with which the execution could be compared; therefore after a reasonable time, which was a year and a day, it was presumed to be executed, and the law allowed him no *seire facias* to show cause why there should not be execution; but if the party had slipped his time, he was put to his action on the judgment, and the defendant was obliged to show how that debt, of which the judgment was an evidence, was discharged. 2 Inst. 469. Carth. 30, 31. 1 Sid. 331.

To remedy this, and to make the forms of proceeding more uniform in both actions, the stat. of West. 2, cap. 45. gave the *seire facias* to the plaintiff to revive the judgment, where he had omitted to sue execution within the year after judgment obtained.

A *seire facias* lies on a judgment in ejectment; for the words of the act are, *seire servitu, seire consuetudines, seire alta quaecunque irresoluta*, which comprehend all judgments and give the like remedy on them by *seire facias*, as the demandant had on a judgment in a real action at common law. 1 Sid. 351. 2 Salk. 600.
But though the general rule be that the plaintiff cannot take out execution after the year and day without a scire facias, yet the rule must be understood with some restrictions.

If a fi. fa., ca. sa. or elegit, be taken out within the year, and returned and awarded on the roll, the same may be continued from term to term to the time of the execution thereof, although after the year; and be as effectual as if the judgment had been revived by scire facias. N: on R. E. 5 Geo. II. But a fi. fa. must be left with the proper officer before he will make the entry on the roll returned by the sheriff. *Impey's K. B.*

If the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is nonsuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a scire facias, because the writ of error was a supersedeas to the execution, and the plaintiff must acquiesce till he hears the judgment above; besides, while the cause is still sub judice, it is not known whether the plaintiff shall recover or not, and the year for the execution ought to be accounted from the final judgment given. *Cro. Jac.* 354. *Yelv.* 7. *1 Roll. Abr.* 899. *4 Leon.* 197. *5 Co.* 88. *Carth.* 236, 237. 6 *Mod.* 288.

So if the plaintiff hath a judgment, with stay of execution for a year, he may, after the year, take out his execution without the scire facias, because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff shall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his instance. 6 *Mod.* 288. 1 *Roll. Ref.* 104.

But if the defendant had been tied up by an injunction out of chancery for a year, yet he cannot take out execution without a scire facias, because the courts of law do not take notice of chancery injunctions as they do of writs of error; besides, in that case, it had been no breach of the injunction to have taken out the execution within the year; and continued it down by *vic* non *misit breve*, which cannot be done in the case of a writ of error, because that removes the record out of the court where the judgment was; and therefore there can be no proceedings below till it be affirmed, and returned to the inferior courts. 1 *Salk.* 322. 6 *Mod.* 288. *S. C.*

In debt, if defendant acknowledge the action for part, and as to the remainder pleads to issue, and the plaintiff hath judgment for that he confesseth; here he may not have execution till the issue is tried for that which he is to recover damages: though if he releases the damages, he may have execution presently for the rest. *Roll.* 897.

3. All judgments of inferior courts in debt are to be executed in the peculiar jurisdictions where given, and cannot be removed to be executed by the superior courts. *Cro. Car.* 34.

Now by stat. 19 Geo. III. c. 70. § 4. where final judgment shall be obtained in any suit in any inferior court of record, any of the courts at Westminster, on affidavit thereof, and that execution has issued against the defendant's person or effects, and that they are not to be found within the jurisdiction of such inferior court, may cause the record of the judgment to be removed into such superior
court, to issue execution thereon in the same manner as in judgment obtained in the said superior courts.

If a judgment given in another court be affirmed or reversed for error in B. R. because the proceedings in the court below are entered upon record in the king's bench, the party shall have execution in that court: and so if a judgment of debt, &c. in the common pleas be affirmed in B. R. on a writ of error. 5 Rep. 88. Though where the record of the judgment given in C. B. is removed into B. R. the party cannot take out execution upon it, without a seire facias quare executionem habeare non debeat. 1 Litt. Abr. 562. And where a writ of error is brought in the exchequer-chamber, to reverse a judgment in B. R. if the judgment is affirmed there, yet that court cannot make out execution upon the judgment affirmed; but the record must be transmitted back to the court of king's bench, where execution must be done. 1 Litt. 565. See tit. Error.

As an execution is an entire thing, he who begins must end it; a new sheriff may restrain an old one to sell the goods on a distringas nuper vicecom' and to bring the money into court or sell and deliver the money to the new sheriff; and the authority of the old sheriff continues by virtue of the first writ, so that when he hath seized, he is compellable to return the writ, and liable to answer the value according to the return; likewise by the seizure, the property of the goods, &c. is devested out of the defendant, and he is discharged, whereby no further remedy can be had against him. 1 Salk. 322. 3 Salk. 159.

A sheriff shall have his fees for executions upon a writ of capias ad satisfaciendum for the whole debt upon a fieri fac. according to the sum levied; and on an elegit it is held by some, that he shall have fees according to what is levied, and by others, for the whole debt recovered, because the plaintiff may keep the land till he is satisfied the entire debt. 1 Salk. 333. Where the sheriff hath a fieri facias or ca. sa. against a man, and before execution he pays him the money, execution may not be done afterwards; if it be, trespass or false imprisonment lies. 5 Rep. 93. 12 Car. B. R. See tit. Sheriff.

It is laid down as a general rule in our books, that the sheriff, in executing any judicial writ, cannot break open the door of a dwelling-house; this privilege, which the law allows to a man's habitation, arises from the great regard the law hath to every man's safety and quiet, and therefore protects them from the inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect; hence, every man's house is called his castle. 5 Co. 91. &c. 3 Inst. 162. Moor, 668. Yelv. 28. Cro. Eliz. 908. Dalt. Sher. 350.

Yet in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of the king and commonwealth are concerned, this general case hath the following exceptions:

1st. That whenever the process is at the suit of the king, the sheriff or his officer may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be. 5 Co. 91, b.
2dly. So in writ of seisin or habere facias possessionem in ejectment, the sheriff may justify breaking open the door if denied entrance by the tenant: for the end of the writ being to give the party full and actual possession, consequently the sheriff must have all power necessary for this end; besides, in this case, the law does not, after the judgment, look upon the house as belonging to the tenant, but to him who has recovered. 5 Co. 91.

3dly. Also this privilege of a man's house relates only to such execution as affects himself; and therefore if a fieri facias be directed to the sheriff to levy the goods of A. and it happens that A.'s goods are in the house of B., if after request made by the sheriff to B. to deliver these goods, he refuses, the sheriff may well justify the breaking and entering his house. 5 Co. 93. a. 1 Sld. 186.

4thly. It hath been adjudged that the sheriff, on a fieri facias, may break open the door of a barn, standing at a distance from the dwelling-house, without requesting the owner to open the door: in the same manner as he may enter a close, &c. 1 Sld. 186. 1 Keb. 698. S. C.

5thly. So on a fieri facias, when a sheriff or his officers are once in the house, they may break open any chamber-door or trunks for the completing execution. 2 Show. 87.

6thly. So if the sheriff's bailiffs enter the house, the door being open, and the owner locks them in, the sheriff may justify breaking open the door for the setting at liberty the bailiffs; for if, in this case, he were obliged to stay till he could procure a homine retiegiendo, it might be highly inconvenient; also it seems that, in this case, the locking in the bailiffs is such a disturbance to the execution, that the court will grant an attachment for it. Palm. 52. Cro. Jac. p. 555. S. C. 2 Roll. Rep. 132. S. C.

7thly. That if the sheriff, in executing a writ, breaks open a door, where he has no authority for so doing by law, yet the execution is good, and the party has no other remedy but an action of trespass against the sheriff. 5 Co. 93. a.

If the sheriff refuses to execute any judicial writ, this is a contempt to the court, for which an attachment will be granted. 1 Salk. 325.

So if he executes the writ, and makes a false return, the party injured may have an action on the case against him. 1 Salk. 323.

4. By a release of all suits execution is gone; for no one can have execution without prayer and suit, but the king only, in whose case the judges ought to award execution ex officio, without any suit: and a release of all executions bars the king. By release of all debts or duties, the defendant is discharged of the execution, because the debt or duty on which it is founded is discharged: but if the body of a man be taken in execution, and the plaintiff release all actions, yet he shall remain in execution. Co. Litt. 291. If a judgment is given in action of debt, and the defendant taken in execution, the plaintiff releaseth the judgment; the body shall be discharged of the execution. And if the plaintiff after judgment releaseth all demands, the execution is discharged. Ibid. Where one is in execution at my suit, and I bid the sheriff let him go; this is a good discharge and release both to the party and sheriff. Poth. 307.
A defendant cannot be taken in execution twice on the same judgment, though he were discharged the first time by the plaintiff's consent, upon an express undertaking that he should be liable to be taken in execution again if he failed to comply with the terms agreed on, which he did. *Blackburn v. Stupart*, 2 East's Ref. 243. See tit. *Debtors*.

But if the plaintiff make a release to the defendant being in execution, or other act amounting to a discharge; it will not be a discharge *ipso facto*, but by this means he may have the same. 5 Rep. 86. *Dyer*, 152.

By Stat. 33 Geo. II. c. 28. if a defendant charged in execution for any debt not exceeding 100l. (extended by Stat. 26 Geo. III. c. 44. for five years, to 200l. extended by 32 Geo. III. c. 5. to 300l.; made perpetual by 39 Geo. III. c. 50.) will surrender all his effects to his creditors, (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of 10l.) and will make oath of his punctual compliance with the statute, such prisoner may be discharged, unless the creditor insists on detaining him; in which case he shall allow him 3s. 6d. per week, to be paid on the first day of every week, and on failure of regular payment the prisoner shall be discharged. Yet the creditor may at any future time have execution against the lands and goods of such defendant, though never more against his person. And on the other hand, the creditors may, as in case of bankruptcy, *compel*, under pain of transportation for seven years, such debtor to make a discovery and surrender of all his effects for their benefit; whereupon he is also entitled to the like discharge of his person. See further, tit. *Prisoner, Insolvent*.

Persons thus charged in execution, in order to take the benefit of these acts, are to exhibit a petition to the court whence the process issued, with an account of their whole estate upon oath, praying to be discharged, &c. And thereupon the court shall order the prisoner to be brought up, and his creditors summoned at a certain day, when the court, in a summary way, is to examine into the same, &c. and order the estate and effects of the prisoner to be assigned to the creditors by endorsement on the back of the petition. § 13.

The prisoners, (except in *London* and *Westminster*) before they petition any of the courts from whence the process issued, for a rule to be brought up, are to give notice to their creditors in writing, that they design to petition, and also a true copy of the account or schedule of their whole estates, which they intend to deliver into the court, &c. And then, upon such petition, the prisoners shall have a rule of court to be brought to the next assizes for the county, at an expense not exceeding 12d. a mile, to be paid to the officer out of the effects of the prisoners, &c. And the creditors must be summoned to appear at the said assizes, by order served on them, or left at their houses thirty days before; and at the assises the judges, on examination, shall determine the matter, and give judgment and relief; a record of which judgment is to be returned and certified to the court whence the process issued, on which the prisoners were taken in execution. No person charged in execution shall be allowed to exhibit a petition to any court at law to be discharged, pursuant to the above acts, un-
less it be done before the end of the next term after he is charged; and those statutes shall not relate to any one taken on a capias for running customizable goods, &c. § 14, 15.

IV. 1. Writs of execution bind the property of goods only from the time of the delivery of the writs to the sheriff; who, upon receipt thereof, endorses the day of the month when received: but land is bound from the day of the judgment. Stat. 29 Car. II. c. 3. Cro. Car. 149. But the judgment must be docketed according to the directions of stat. 4 & 5 W. & M. c. 20, by which, for the greater security of purchasers, it is enacted, that the clerk of the essoins of the court of C.B., the clerk of the doggets of the court of king's bench, and the master of the office of pleas in the court of exchequer, shall make and put into an alphabetical dogget, by the defendant's names, a particular of all judgments, as well by confession, non summ unformatum, nihil dicit, &c. as on verdict entered in their several courts, &c. and that no judgment not doggeted, and entered in the books as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestor's, testator's, or intestate's estates. See tit. Judgment.

Notwithstanding this statute, if after the writ delivered to the sheriff; and before execution is executed, the defendant becomes bankrupt, that will hinder execution. 3 Salk. 159. See tit. Bankrupt.

The plaintiff takes out execution by fieri facias against the defendant; all the goods and chattels that he had at the time of the execution will be liable to it: and where debt or damages are recovered, the plaintiff shall have execution of any land the defendant had at the time of the judgment; not of the lands he had the day when the first writ was purchased. Roll. Abridg. 893. By stat. 29 Car. II. c. 3. sheriff's may deliver in execution all lands whereof others shall be seised in trust for him against whom execution is had on a judgment, &c.

The sale of goods for a valuable consideration, after judgment, and before execution awarded, is good. And if judgment be given against a lessee for years, and afterwards he selleth the term before execution, the term assigned bona fide is not liable; also if he assign it by fraud, and the assignee sells it to another for a valuable consideration, it is not liable to execution in the hands of the second assignee. Godb. 161. 2 Nels. Abrid. 783. If a person has a bill of sale of any goods in nature of a security for money, he shall be preferred for his debt to one who hath obtained a judgment against the debtor before those goods are sold; for, till execution lodged in the sheriff's hands, a man is owner of his goods, and may dispose of them as he thinks fit, and they are not bound by the judgment. Preced. Ch. 285. But where a man generally keeps possession of goods after sale, it will make the same void against others, by the statute of fraudulent conveyances. And where, on an execution, the owner of the goods, by agreement, was to have the possession of them upon certain terms; afterwards another got judgment against the same person, and took those goods in execution; it was adjudged they were liable; and
that the first execution was by fraud, and void against any subsequent creditor; because there was no change of the possession, and so no alteration of property. *Ibid.* 287. See tit. *Fraud.*

A *fieri facias* being executed fraudulently, a *fieri facias* at the suit of another person afterwards shall stand good, and be preferred; and on trial, it is a matter proper to be left to a jury. 1 *Wils.* 44.

Where two writs of *fieri facias* against the same defendant are delivered to the sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution. 1 *Term Rep.* 729. But where the sheriff has given a bill of sale to the person claiming under the second execution, this entitles the latter to secure his debt, and the sheriff is liable to the plaintiff who delivered the first writ. *Ib.* 731.

Execution may be made of lands that the defendant hath by purchase after the judgment; although he sell the same before execution. *Roll.* 892.

The stat. 8 *Ann.* c. 14. directs, that where there is an execution against goods or chattels, of a tenant for life, or years, the plaintiff, before removal of the goods by the execution, is to pay the landlord the rent of the land, &c. so as there be not above a year due; and if more be due, paying a year's rent, the plaintiff may proceed in his execution, and the sheriff shall levy the rent paid, as well as the execution-money.

But a ground-landlord cannot come in for a year's rent in the case of an execution against an under-lessee; for the statute only extends to the immediate landlord. *Str.* 787. And the landlord must give the sheriff notice, or he is not bound. 1 *Str.* 97. *Vide* 2 *Wils.* 140.

2. The king, by his prerogative, may have execution of the body, lands, or goods of his debtor, at his election. *Hob.* 60. 2 *Inst.* 19. 2 *Roll. Abr.* 472.

As to the king's execution of goods, the same relates to the time of the awarding thereof, which is the *tost* of the writ, as it was in the case of a common person at law; for though by the 29 *Car. II.* *cap.* 3. no execution shall bind the property of goods, but from the time of the delivery of the writ to the sheriff; yet as this act does not extend to the king, an *extent* of a *later testa* supersedes an execution of the goods by a *former writ*; because by the king's prerogative at common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded till the extent was executed, because the public ought to be preferred to private property. 2 *New Abr.* 365.

If the king's debt be *prior on record*, it binds the lands of the debtor, into whose hands soever they come, because it is in the nature of an original charge upon the land itself, and therefore must subject every body that claims under it; but if the lands were aliened in whole, or in part, as by granting a jointure before the debt contracted, such alienence claims prior to the charge, and in such case the land is not subject. See 2 *Roll. Abr.* 156, 157; *Moor.* 126. 3 *Leon.* 239, 240. 4 *Leon.* 10.

*Execution* for the king's debt, or *prerogative execution*, is always preferred before any other executions. 7 *Rep.* 20. And if a de-
occius V. 1, 2.

The defendant is taken by capias ad satisfaciendum, and before the return thereof a prerogative writ issues from the exchequer, for the debt of the king, tested a day before he was taken, here he shall be held in execution for the king's debt and that of the subject. Dyer, 197. Lands entitled in the hands of the issue in tail, when subject to the king's extent, and where not, see 7 Rep. 21. See also, this Dict. tit. King, Extent.

Process sued out by the crown against a defendant to recover penalties, upon which judgment for the crown is afterwards obtained, entitles the king's execution to have priority within 33 Hen. VII. c. 39. § 74. before the execution of a subject, whose execution had issued and been commenced on a judgment recovered against the same defendant prior to the king's judgment, but subsequent to the commencement of the king's process: the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. Butler v. Butler, 1 East, 338. Att. Gen. v. Aldersey, Mich. 1789, S. P. ib.

V. 1. An execution may be set aside as irregular, by supersedeas, and the party have restitution, &c. Carthw. 460, 461. 468. It hath been resolved, that a writ of error is a supersedeas from the time of the allowance: though, if a writ of execution be executed before the writ of error is allowed, it may be returned afterwards. 1 Buck. 321. No writ of execution shall be stayed by any writ of error or supersedeas, after verdict and judgment, in any action upon the case for payment of money, covenant, detinue, trespass, &c. until recognisance be entered into, as directed by 3 Jac. I. cap. 8. &c. Judgment was had against a person at Bristol, and his goods attached there; and the court of B. R. being moved to stay the execution until a writ of error brought should be determined, they granted a habeas corpus, but nothing to stay the execution. 1 Bulst. 268. See tit. Error.

A defendant cannot plead to any writ of execution; (though he may in bar of execution to seire a facias brought;) but if he hath any matter after judgment to discharge him of the execution, he is to have audita querela. Ca. Litt. 290. Or, move the court for relief, which is now the usual method.

If husband and wife are taken in execution for the debt of the wife, the wife shall be discharged: for the husband being in execution, the wife shall not be so also, and because the wife hath nothing liable to the execution. 1 Lev. 51.

The execution of a liberate is good without being returned; and where a man is taken upon a ca. sa. the execution is good, though the writ is not returned: And so in all cases where no inquest is to be taken, but only lands delivered, or seisin had, &c. which are only matters of fact. 4 Rep. 67. 5 Rep. 89.

2. There were anciently castles, fortresses, and liberties, where they resisted the sheriff in executing the king's writs, which creating great inconvenience, the statute of Westm. 2. cap. 39. (13 Edw. I.) hindered the sheriff from returning executors to the king's writ of execution, and directed him to take the possis comitatis. See the stat. and 2 New Abr. 368.

The judges construed the words of the statute to extend only to Vol. II.
executions, and not to writs on mesne process; that the sheriff was not obliged to carry the *pose comitatis* where the man was bailable, for they did not presume that in such cases the king's writ would be disobeyed. *2 New Abr.* 368.

The original of commitment for contempts seems to be derived from this statute; for since the sheriff was to commit those who resisted the process, the judges who awarded such process must have the same authority to vindicate it; hence, if any one offers any contempt to his process, either by word or deed, he is subject to imprisonment during pleasure, *viz.* from whence they shall not be delivered without the king's special commandment. *2 New Abr.* 368. See tit. *Debt, Error.*

See further, on executions in civil cases in general, *Com. Dig.*

**Execution of Criminals.** Must in all cases, as well capital as otherwise, be performed by the sheriff or his deputy; whose warrant for so doing was anciently by precept under the hand and seal of the judge, as is still practised in the court of the lord high steward upon the execution of a peer. *2 Hale, 409.* Though in the court of the peers in parliament it is done by writ from the king; afterwards it was established, that in case of life, the judges may command execution to be done without any writ. *Finch, 478.* And now the usage is for the judge to sign the calendar, a list of all the prisoners' names, with the separate judgments in the margin, which is left with the sheriff: the sheriff, on receipt of this warrant, is to do execution within a convenient time, which in the country is left at large; in *London,* the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do execution at the day and place assigned. See & *State Trials,* 352. *Post. 43.* & *Comm. 403.*

It is held by *Coke* (3 *Inst.* 52.) and *Hale* (2 *H. P. C.* 272, 412.) that even the king cannot change the punishment of the law, by altering hanging (or burning when used) into beheading; though, when beheading is part of the sentence, the king may remit the rest. And notwithstanding some examples to the contrary, *Coke* maintains that *judicandum est legibus, non exemplis.* But others have thought, and more justly, that this prerogative being founded in mercy, and immemorially exercised by the crown, is part of the common law. *Post. 270.* *Fitz. N. B.* 244. b. 19 *Rym. Fad.* 284. For hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons, (*viz.* by remitting a severer kind of death, on condition that the criminal submits to a milder,) is a matter that may bear consideration. *4 Comm. 404.* There are ancient precedents wherein men condemned to be hanged for felony have been beheaded by force of a special warrant from the king. *Bract. 104.* *Staunf. 13.*

Subsequent justices have no power by the stat. 1 *Edw VI.* c. 7. to award execution of persons condemned by former judges; but if judgment has not been passed on the offenders, the other justices may give judgment, and award execution, &c. *2 Hawk.*
EXECUTION—AND reprieve. 499

... where the criminal was tried and convicted; except the record of the attaint or
be removed into B. R. which may award execution in the county
where it sits. 3 Inst. 31. 211. 217.

If, upon a record removed, an outlawed person confess himself
to be the same person, execution shall be had; but if he deny it,
and the king’s attorney confesses he is not, he shall be discharged;
though if the attorney-general take issue upon it, the same shall
be tried. 2 Hale’s Hist. P. C. 402. 463. If a person, when attainted,
stands mute to a demand why execution shall not go
against him, the ordinary execution shall be awarded. 2 Hawk.
P. C. In case a man condemned to die, come to life after he is
hanged, as the judgment is not executed till he is dead, he must
be hung again. Finch, 389. 2 Hale’s P. C. 412. 2 Hawk. P. C.
Comm. 406. And so was the law of old; for if a criminal thus
escaped, and fled to sanctuary, he was not permitted to abjure the

The body of a traitor or felon is forfeited to the king by the
execution; and he may dispose of it as he pleases. The execution
of persons under the age of discretion is usually respited, in
order to obtain a pardon. 1 Hawk. P. C. c. 1. § 8.

By the stat. 35 Geo. II. c. 37. persons convicted of murder are to
be executed the day next but one after sentence; [unless that happens
to be Sunday, for which reasons murderers are generally
tried on Friday, to afford them a merciful respite of one day more
to prepare for eternity;] and their bodies delivered to surgeons
to be anatomized. The judge may stay the sentence, and appoint
the body to be hung in chains or anatomized, but not buried. And,
by the said statute, to rescue the body of any such malefactor from
the custody of the sheriff after execution, is made felony, punishable
by transportation for seven years. And to rescue such criminal
going to, or during execution, is felony without benefit of
clergy. See this Dict. tit. Rescue. Under this act the time and
place of the execution are part of the judgment, but in no other
case whatever. 4 Comm. 404. See further, ut. Murder; and as
to these executions in general, titles Treason, Felony, and other
proper titles.

Execution may be avoided by a reprieve or a pardon; whereof
the former is only temporary, the latter (as to which, see this Dict.
tit. Pardon) is permanent.

A reprieve, from repredce to take back, or more immediately
from the participle reprim] is the withdrawing of a sentence for
an interval of time, whereby the execution is suspended. This
may be ex arbitrio judicis, either before or after judgment; as
where the judge is not satisfied with the verdict, or the evidence
is suspicious, or the indictment is insufficient; or he is doubtful
whether the offence be within clergy; or sometimes if it be a small
felony, or any favourable circumstances appear in the criminal’s
character, in order to give room to apply to the crown for either
an absolute or conditional pardon. These arbitrary reprieves may
be granted or taken off by the justices of gaol delivery, although
their session be finished, and their commissions expired; but
this rather by common usage than of strict right. 2 Hale’s P. C.
412.

Reprieves may also be ex necessitate legis.
EXECUTION—OF STATUTES.

If a woman quick with child be condemned either for treason or felony, she may allege her being with child in order to get the execution respited; and thereupon the sheriff or marshal shall be commanded to take her into a private room, and to empanel a jury of matrons to try and examine whether she be quick with child or not; and if they find her quick with child, the execution shall be respited till her delivery. But it is agreed, that a woman cannot demand such respite of execution by reason of her being quick with child more than once; and that she can neither save herself by this means from pleading upon her arraignment, nor from having judgment pronounced against her upon her conviction. Also it is said, both by Staundford and Coke, that a woman can have no advantage from being found with child, unless she be also found quick with child. 2 Hawk. P. C. c. 51. § 9, 10.

Another cause of regular reprieve is, if the offender become non compos between the judgment and the award of execution. 1 Hale’s F. C. 376. For regularly though a man be compos when he commits a capital crime, yet if he becomes non compos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege why execution should not be awarded against him; and if he appears to be insane, the judge, in his discretion, may and ought to reprieve him.

The party may also plead in bar of execution; which plea may be either pregnancy, (of which above,) the king’s pardon, an act of grace; (see tit. Pardon;) or lastly, diversity of person, viz. that he is not the same that was attainted, and the like. In this last case a jury shall be empanelled to try this collateral issue, namely, the identity of his person, and not whether guilty or innocent, for that has been decided before; and in these collateral issues the trial shall be instantiæ, and no time allowed the prisoner to make his defence, or produce his witnesses, unless he will make oath that he is not the person attainted. 1 Sid. 72. Post. 42. Neither shall any peremptory challenges of the jury be allowed the prisoner; though formerly such challenges were held to be allowable whenever a man’s life was in question. 1 Lev. 51. Post. 42. 46. Staundf. P. C. 153. Co. Litt. 157. Hal. Sum. 239.

Every judge who hath power to order execution, hath power to grant a reprieve; and execution is often stayed on condition of transportation. See stat. 8 Geo. III. c. 15. for a power given to judges of assise to reprieve for the purpose of obtaining a conditional pardon. See also this Dict. tit. Transportation, Felony, Clergy. 2 Hawk. P. C. c. 51. But no prisoner convicted of any felony, for which he cannot have his clergy, at the sessions at the Old Bailey for London and Middlesex, &c. ought to be reprieved but in open sessions; and reprieves are not to be granted otherwise, but by the king’s express warrant. Kel. 4.

EXECUTION OF STATUTES. The court of Star Chamber, erected in the reign of King Hen. VII. was said to be for the execution of statutes, &c. Stat. 3 Hen. VII. c. 1.
EXECUTOR.

EXECUTIO N E FACIENDA, A writ commanding execution of a judgment, and diversely used. Reg. Orig.

EXECUTIO N E FACIENDA IN WITHERNAM I UM, A writ that lies for taking his cattle, who hath conveyed the cattle of another out of the county, so that the sheriff cannot replevy them. Reg. Orig.

EXECUTIONE JUDICII, Is a writ directed to the judge of an inferior court to do execution upon a judgment therein, or to return some reasonable cause wherefore he delays the execution. Fitz. N. B. 20. If execution be not done on the first writ, an alias shall issue, and a pluries with this clause, vel causam nobis signis clauses quare, &c. And if upon this writ execution is not done, or some reasonable cause returned why it is delayed, the party shall have an attachment against him who ought to have done the execution, returnable in B. R. or C. B. New Nat. Brev. 43. If the judgment be in a court of record, this writ shall be directed to the justices of the court where the judgment was given, and not unto the officer of the court; for if the officer will not execute the writs directed unto him, nor return them as he ought, the judges of the court may amerce him. New Nat. Brev. 43. See tit. Execution III. 3. and the stat. 19 Geo. III. c. 70. there mentioned.

One may have a writ de executione judicci out of the chancery to execute a judgment in an inferior court, although a writ of error be brought to remove the record, and reverse the judgment: if he that brings the writ of error do not take care to have the record transcribed, and the writ of error returned up in due time. 1 Lill. Abr. 562.

EXECUTIVE POWER. The supreme executive power of these kingdoms is vested, by our laws, in a single person, the king, or queen, for the time being. 1 Comm. 190, &c. See tit. King.

EXECUTOR, Lat.] One appointed by a man’s last will and testament to perform or execute the contents thereof after the testator’s decease; and to have the disposing of all the testator’s substance, according to the tenor of the will: he answers to the heres designatus, or testamentarius, in the civil law, as to debts, goods, and chattels of his testator. Terms de Leg.

The rights, powers, and duties of executors and administrators, being in many respects similar, and the several determinations in the books being generally applicable to both, it seems most methodical and useful to consider them together; for which purpose reference is made from tit. Administrator to this place. The present summary is founded on the Commentaries, having various points and heads from other sources interwoven on that excellent ground work. See 2 Comm. c. 32. For particular information at large on these subjects, see also Com. Dig. tit. Administration and Administrator; and also, Viner’s Abridgment, tit. Executor.

I. 1. Of the Appointment of Administrators in Cases of Intestacy.

2. How Administrations may be revoked.

II. Of the Appointment of Executors, and particular Administrators; and see IV.
III. Of Administrations to Next of Kin, or on Failure of them; and see V. 8.

IV. Of the Distinction in Interest between Executors and Administrators.

V. Of the Duty of Executors and Administrators.
   1. Of Executor de son tort.
   2. Of burying the Deceased.
   3. Proving the Will.
   4. Making Inventory.
   5. Collecting the Goods.
   6. Paying the Debts in due Order of Priority.
   7. Give Legacies; and see tit. Legacy.
   8. Distribution of the Residue, to the Executor himself or next of Kin; and herein,
   9. Paying of the Customs of London and York, as to Intestates.

VI. 1. Of Actions by and against Administrators.
   2. Executors. And herein of Devastavit.

I. 1. In case a person makes no disposition of his effects by will, he is said to die intestate; and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the general trustee of the kingdom. 9 Rep. 38. This prerogative the king continued to exercise for some time, by his own ministers of justice; and probably in the county court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron, and other courts, or to have their wills there proved, in case they make any. 9 Rep. 37. Afterwards the crown, in favour of the church, invested the prelates with this branch of the prerogative; and then the ordinary might seize the goods, and keep them without wasting; and also might give, alien, or sell them at his will, and dispose of the money, in pios usus; being thus, probably, merely the king's almoner in his diocese. Finch's Law, 173, 174. Plovdd. 277.

As the ordinary had thus the disposition of the intestate’s effects, the probate of wills of course followed; for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his goods was superseded thereby.

By degrees, through an abuse of this power of the ordinary, often complained of before it was redressed, the popish clergy secured the intestate’s estate to themselves, without paying even his lawful debts; for which reason it was enacted by stat. West. 2. (13 Edw. I. A. D. 1283,) c. 19. that the ordinary shall be bound to pay the debts of the intestate, so far as his goods will extend, in the same manner as executors were bound in case of a will. But still the residue remained in the hands of the ordinary; and the continued abuse of this power at length produced the stat. 31 Edw. IV. c. 11. (A. D. 1357,) which provides, that in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods, which administrators are
put upon the same footing, with regard to suits, and to accounting, as executors. The next and most lawful friend is interpreted to be the next of blood, who is under no legal disabilities. 9 Rep. 39. The stat. 21 Hen. VIII. c. 5, enlarges the power of the ecclesiastical judge a little more; permitting him to grant administration either to the widow or the next of kin, or to both of them, at his discretion; and, where two or more persons are in the same degree of kindred, gives the ordinary his election to accept which he pleases.

1 Sid. 179. Baym. 93. 1 Show. 351. 1 Salk. 36.

On this footing now stands the general law relative to the appointment of administrators. Who are the next of blood, or, as it is usually called, next of kin, is stated post, III. and V. 8.

2. The ordinary ought not to repeal letters of administration which he hath duly granted; but if they are granted to such persons who ought not by law to have them, he may revoke them. 1 Litt. 38. For just cause they may be revoked, as where a person is a lunatic, &c. And if granted where not grantable, they may be repealed by the delegates. 1 Lev. 157. 186. If administration is granted, and afterwards a will is produced and proved, the administration shall be revoked; and all acts done by the administrator are void. 2 Roll. Abr. 907. If a citation is granted against a stranger administrator, and his administration is revoked by sentence, yet all acts done by him bona fide as administrator are good till the revocation; the administration being only voidable. 6 Rep. 18. 8 Rep. 135. But if there is any fraud, a creditor may have relief upon the stat. 13 Eliz. cap. 5. And when the first administration is merely void, as granted by a wrong person, &c. it is otherwise: so when there is an appeal from the grant of the administration, to suspend the former decree. 5 Rep. 30. Administration was granted to J. S. and he released all actions, and afterwards the administration was revoked, and declared void; this release was held good. 1 Brownl. 51. Qu. If it had been without consideration? If an administrator gives goods away, and then administration is revoked or repealed, it is said the gift is good; except it be by covin, when it shall be void only against a creditor by statute: and where the administrator, after many goods administered, had his administration revoked, and it was committed to B. who sued the first administrator for goods unduly administered, it was held that there was no remedy but in chancery. 6 Rep. 19. Clart. 44. 4 Shep. Abr. 89. See Hob. 366. But in such a case as this, it seems that the second administrator might maintain an action at law against the first, for money had and received, &c. or trover for any goods remaining in his possession, or by him converted and not duly administered.

In 2 Leon. 155. it is said, where the first administration is void, the administrator who, under the administration, takes the goods, is a trespasser. Letters of administration obtained by fraud are void. 3 Rep. 78. 6 Rep. 18, 19. 8 Rep. 143.

See the several cases on this part of the subject, collected in 1 Com. Dig. tit. Administrator, (B. 8.) the result of which (as given in A Burn's Ecclesiastical Law, 256.) is, that an administration may be repealed, although not arbitrarily, yet where there shall be a just cause for so doing; of which the temporal courts are to judge.
II. All persons are capable of being executors, that are capable of making wills; and many others besides; as *femias coeverta* and infants: nay, even infants unborn, or in ventre ses meres, may be made executors. *West. Symb.* p. 1. § 635.

A popish recusant convict cannot be an executor. 9 *Ref. 37.*

A mayor and commonalty may be made executors. 1 *Roll. Abr.* 915. And if the king is made executor, he appoints others to take the execution of the will upon them, and to take account. 5 *Ref. 29.*

It seems agreed, that, by our law, an alien, or one born out of the allegiance of our king, may be an executor or administrator; also it hath been adjudged, that such a one shall have administration of leases as well as personal things, because he hath them in *auter drot*, and not to his own use. *Off. of Ex.* 17.

But it has been long doubted whether an alien enemy should maintain an action as executor; for, on the one hand, it is said, that by the policy of the law, alien enemies shall not be admitted to actions to recover effects, which may be carried out of the kingdom to weaken ourselves and enrich the enemy, therefore public utility must be preferred to private convenience; but on the other hand it is said, that those effects of the testator are not forfeited to the king by way of reprisal, because they are not the alien enemy’s, for he is to recover them for others; and if he allows such alien enemies to possess the effects as well as an alien friend, he must allow them power to recover, since in that there is no difference, and by consequence he must not be disabled to sue for them; if it were otherwise, it would be a prejudice to the king’s subjects, who could not recover their debts from the alien executor, by his not being able to get in the assets of the testator. *Cro. Eliz.* 683. *Moor*, 431. *Carter*, 49-191. *Skin.* 370.

But an excommunicated person cannot be an executor or administrator; for by the excommunication he is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses. *Co. Litt.* 134. *Swineb.* 349. *Godolphin.* 83.

No infant can act as executor till the age of 17 years; till which time, administration must be granted to some other *durante minore etate*. *Went. Off. of Ex.* c. 18. 6 *Ref. 67.* 4 *Inst.* 335.

And if the right of administration devolves on an infant, administration *durante minore etate* is to be granted till he arrives at twenty-one. *Godolphin.* 102. 5 *Co.* 29. *Hob.* 250. *Yatt.* 128.

And as such an administrator is but in nature of a curator for the infant, and has no interest or benefit in the testator or intestate’s estate, but in right of the infant, it has been always held discretion in the ordinary to whom to grant it, and therefore it hath been frequently adjudged, that he is not obliged within the statute. 21 *Hen. VIII.* c. 5. to grant it to the next of kin either of the deceased, or the infant. *Hob.* 250. 1 *Vent.* 219. 1 *Keb.* 549. 3 *Mod.* 24. 1 *New Abr.* 381.

If an infant, and one of full age, are made executors, he who is of full age may take out administration *durante minore etate* of the infant, and may declare as executor or administrator *durante minore etate*; and there is no absurdity in this case, that there should be an executor and administrator to the same party. 1 *New Abr.* 381.
In like manner, as it may be granted *durante absentia* or *pendente lite*; when the executor is out of the realm; 1 *Lecw.* 342. or when a suit is commenced in the ecclesiastical court, touching the validity of the will. 2 *P. Wms.* 589, 590.

The appointment of an executor is essential to the making of a will; (Went. c. 1. *Plov. 281.*) and it may be performed either by express words, or such as strongly imply the same: but if the testator makes an incomplete will, without naming any executors; or if he names incapable persons; or if the executors named refuse to act, (see 9 *Rep.* 37. *Went. Off.* *Ex.* 38.) in any of these cases administration must be granted *cum testamento annexo* to some other persons; (1 *Roll. Abr.* 907. *Comb.* 20.) and then the duty of the administrator, as also when he is constituted only *durante minore estate*, *sc. is very little different from that of an executor. See *Gann.* l. 7. c. 6.

A man may appoint two or more persons to be joint executors, and they are accounted in law but as one person. See *host.* V. 3. 5. Such joint executors shall not be charged by the acts of their companions, any further than for effects *actually* come to their hands. *Moor.* 650. *Cro. Eliz.* 318. 2 *Leon.* 209. But if two or more executors *join in a receipt*, [in writing,] and one of them only actually receives the money, each is liable for the whole, as to *creditors at low*, but not as to *legates*, or next of kin. 1 *Salk.* 318. If joint executors, by agreement among themselves, agree that each shall intermeddle with a certain part of the testator’s estate, yet each shall be chargeable for the whole (to *creditors*) by agreeing to the other’s receipts. *Hard.* 314.

III. If the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted to such administrator as the *stat.* 31 *Edw.* III. c. 11. and 29 *Hen.* VIII. c. 4. (see *ante,* I.) direct; in consequence of which it is to be observed, 1st. That the ordinary is compellable to grant administration of the goods of the wife to the husband, or his representatives; (Croc. *Car.* 106. Stat. 20 *Car.* II. c. 3. 1 *P. Wms.* 381.) and of the husband’s effects to the widow, or next of kin. *Salk.* 36. *Sta.* 532. 2dly. That among the kindred, those are to be preferred that are the nearest in degree to the intestate. 3dly. That this nearness of degree shall be reckoned according to the computation of the civilians; (Pre. *Ch.* 593.) and not of the canonists, which the law of England adopts in the descent of real estates; (see it *Descents*) and therefore, in the first place, the *children*, or on failure of children, the *parents* of the deceased are entitled to administration; both which are indeed in the first degree, but the children are allowed the preference. *Godolph.* f. 2. c. 34. § 1. 2 *Vern.* 125. Then follow *brothers,* *grandfathers,* (Pre. *Ch.* 527. 1 *P. Wms.* 41.) *uncles* or *nephews*; (Atk. 455.) and the females of each class respectively; and lastly, *cousins.* 4thly. The *half* blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and only excluded from inheritances of land, upon feodal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood; (1 *Vent.* 425.) and the ordinary may grant administration to the sister of the half, or the brother of the whole *blood, at his Vol. II.
own discretion. Aleyn, 36. Sty. 74. See post, V. 5. 6thly. If none of the kindred will take out administration, a creditor may, by custom, do it. Salk. 38. 6thly. If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin. 1 Sid. 281. 1 Vent. 219. And, lastly, the ordinary may, in defect of all these, commit administration, (as he might have done before the stat. 31 Edw. III. c. 11. Plowd. 278.) to such discreet person as he approves of: or (in these cases, as well as in that of an executor's refusal, Cro. Eliz. 92.) may grant him letters ad colligendum bona defuncti, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody; (Went. c. 14.) and to do other acts for the benefit of such as are entitled to the property of the deceased. 2 Inst. 398. If a bastard who has no kindred, being natus fictus, or any one else that has no kindred, dies intestate, and without wife or child, it hath formerly been held, (Salk. 37.) that the ordinary might seize his goods, and dispose of them in fios usus. But the usual course now is, for some one to procure letters patent, or other authority from the king; and then the ordinary, of course, grants administration to such appointee of the crown. 3 P. Wms. 33.

IV. The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor; so that the executor of A.'s executor is to all intents and purposes the executor and representative of A. himself; see 25 Edw. III. st. 5. c. 5. 1 Leon. 275, but the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. Bro. Abr. tit. Administrator, 7. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he hath equal confidence: but the administrator of A. is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A.'s executor, he has clearly no privity or relation to A. being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, of the goods of the deceased, not administered by the former executor or administrator. And this administrator de bonis non, is the only legal representative of the deceased in matters of personal property. Sty. 225. But he may, as well as an original administrator, have only a limited or special administration committed to his care, viz. of certain specific effects, such as a term of years and the like; the rest being committed to others. 1 Roll. Abr. 908. Godolphin, p. 2. c. 30. Salk. 36. 1 New Abr. 385. See also the stats. 43 Eliz. c. 8. 30 Car. II. c. 7.

If an executor dies before probate, such an executor's executor cannot prove the will, because he is not named therein, and no one can prove a will but he who is named executor in it; but if the
first executor had proved the will, then his executor might have been executor to the first testator, there requiring no new probate.

1 Satk. 299.

Though an executor of an executor may thus be executor to the first testator, yet he may take upon him the executorship of his own testator, and refuse to intermeddle with the estate of the other: and if the first executor refuses, (as if he dies before probate,) his executor shall not administer to the first testator. Dyer; 372.

V. 1. The duty and office of executors and administrators in general are very much the same; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and, secondly, that an executor may do many acts before he proves the will; Wentw. c. 3. but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will, and not from the probate; the latter owes his entirely to the appointment of the ordinary. Com. 51.

If a stranger takes upon him to act as executor, without any just authority, (as by intermeddling with the goods of the deceased,) 5 Rep. 33, 34; and many other transactions, Wentw. c. 14. Stat. 43 Eliz. c. 8. he is called in law an executor of his own wrong, [de son torti,] and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong. Dyer, 166. Such a one cannot bring any action himself in right of the deceased, (Bro. Abr. tit. Administrator, 8.) but actions may be brought against him. And in all actions by creditors against such an officious intruder, he shall be named an executor generally, (5 Rep. 31.) for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof. 12 Mod. 471. He is chargeable with the debts of the deceased, so far as assets comes to his hands. Dyer, 166. And as against creditors in general, shall be allowed all payments made to any other creditor in the same or superior degree, 1 Chan. Cas. 33. himself only excepted, in which he differs from a rightful executor. 5 Rep. 39. Moor, 527. And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages, (12 Mod. 441. 471.) unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt. Wentw. c. 14.

When there is a rightful executor, and a stranger possesses himself of the testator's goods, without doing any further act as executor, he is not an executor de son torti, but a trespasser. Dyer, 105. Roll. Abr. 918. See 5 Rep. 82. An executor of his own wrong may be sued as executor, and he shall be sued for legacies as well as a rightful executor. Noy, 13. Though an executor de son torti cannot maintain any suit or action, because he cannot produce any will to justify it, yet he will be severely punished for a
false plea; for in such case the execution shall be awarded for the whole debt, though he meddled with a thing of very small value. Nov. 69.

Debt was brought against an executor of his own wrong, who pleaded that he never was executor, nor administered as such; it was held not to be material whether he had assets or no, but to prove that he had administered any thing was enough; for this would make him chargeable with the debt: but if he had not pleaded falsely, he would have been liable for no more than the value of the goods of the deceased. Stv. 120.

If an executor of his own wrong possesses himself of goods, and afterwards administration is granted him, he may, by virtue thereof, retain goods for his own debt. 5 Refs. 39. And where a man took possession of an intestate's goods wrongfully, and sold them to another, and then took out administration, it was adjudged that the sale was good by relation. Moore, 136. An executor de son tort shall be allowed in equity all such payments which a rightful executor ought to have paid. 2 Chanc. Refs. 39. See further, post, VI. 2. and this Dict. tit. Devastavit.

A creditor of an intestate, who received goods of the intestate after his death from his widow, in payment of the debt, cannot protect his possession against an action of trover by the lawful administrator, upon the ground of such delivery having been made by one who had, by such intermeddling, made herself executrix de son tort; no fact appearing to give colour to having acted in the character of executrix, except the single act of wrong complained of, in which the defendant participated. Qu. How far any payment by an executor de son tort to a creditor can be set up as a bar to an action of trover by lawful executor, &c. though if it be such as the latter would have been bound to make, it shall be recouped in damages. Mountford, administrator of Holland, v. Gibson, 4 East, 441.

2. The executor or administrator must bury the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of devastation or waste of the substance of the deceased; and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased. Saik. 196. Godolph. f. 2. c. 26. § 2. See post, VI. 2. and this Dict. tit. Devastavit, Funeral.

3. The executor or administrator durante minore stare, or durante abscenitad, or cum testamento annexo, must prove the will of the deceased; which is done either in common form, which is only upon his own oath before the ordinary, or his surrogate; or fier testes, in more solemn form of law, in case the validity of the will be disputed. Godolph. f. 1. c. 20. § 4. When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof, in parchment, is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him; all which together is usually styled the probate. By stat. 37 Geo. III. c. 90. the executor must take probate within six months on penalty of 50/. See tit. Probate.
If there are many executors of a will, and one of them only proves the will, and takes upon him the executorship, it is sufficient for all of them; but the rest after may join with him, and intermeddle with the testator's estate; but if they all of them refuse the executorship, none of them will ever afterwards be admitted to prove the will; the ordinary, in this case, grants administration with the will annexed. 9 Rep. 37. 1 Rep. 113. Perk. 485.

An executor may refuse an executorship; but the refusal ought to be before the ordinary: if an executor be summoned to accept or refuse the executorship, and he doth not appear on the summons, and prove the will, the court may grant administration, &c. which shall be good in law till such executor hath proved the will; but no man can be compelled to take on him the executorship, unless he hath intermeddled with the estate. 1 Leon. 154. Cro. Eliz. 858. Where there are several executors, and they all refuse, none of them shall administer afterwards; but if there is a refusal by one, and the other proves the will, the refusing executor may administer when he will during the life of his coexecutor. 1 Rep. 28. If there is but one executor, and he administer, he cannot refuse afterwards; and if once he refuse, he cannot administer afterwards. Thus, where a testator being possessed of lands, &c. for a term of years, devised the same to the Chief Justice Catline, and made him executor, and died; afterwards the executor wrote a letter to the judge of the prerogative court, intimating that he could not attend the executorship; and desireing him to grant administration to the next of kin to the deceased, which was done accordingly; and after this the executor entered on the lands, and granted the term to another; it was adjudged void, because the letter which he wrote was a sufficient refusal; and he may not once refuse, and afterwards take upon him the executorship. Moor, 272.

An executor, after a caveat entered against the will, took the usual oath of an executor, and afterwards refused to prove the will; and it was held, that having taken the oath of executor, the court could not admit him to refuse afterwards, but ought to grant probate to him, notwithstanding the caveat, or another's contesting for the administration, &c. 1 Vent. 353. See tit. Executor.

As the testator has thought the executor appointed a proper person to be entrusted with his affairs, the ordinary cannot adjudge him disabled or incapax; but a mandamus shall issue from B. R. for the ordinary to grant probate of the will, and admit the executor, if he refuse him; neither can the ordinary insist upon security from the executor, as the testator hath thought him able and qualified. 1 Salk. 299.

And although an executor becomes bankrupt, yet it is said the ordinary cannot grant administration to another; but if an executor become non compos, the spiritual court may commit administration for this natural disability. 1 Salk. 307. If an executor takes goods of the testator's, and convert them to his own use; or if he either receive or pay debts of the testator, or give bond for payment; make acquittances for them, or demand the testator's debts as executor; or give away the goods of the testator, &c. these are an administration, so that he cannot afterwards refuse the execu-
torship: and it has been held, that if the wife of the testator take more apparel than is necessary, it is an administration. *Offic. Exec. 39.*

It is usual when there is a contest about a will, or when the right of administration comes in question, to enter a *caveat* in the spiritual court, which, by their law, is said to stand in force for three months. *Godol. 258. Goldst. 119. 2 Roll. Repf. 6. Cro. Jac. 463, 464.*

But it is said that our law takes no notice of a *caveat*, and that it is but a mere cautionary act done by a stranger, to prevent the ordinary from doing wrong; and that therefore, if administration be granted pending a *caveat*, this is valid in our law, though, by the law in the spiritual court, it may be such an irregularity as will be sufficient to repeal it. *1 Roll. Repf. 191. Cro. Jac. 463.*

In defect of any will, the person entitled to be administrator must also, at this period, take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him; and he must, by stat. 22 & 23 Car. II. c. 10, enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones; but if the deceased had *bona notabilia*, or chattels to the value of a hundred shillings, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative. *4 Inst. 325.* Hence the courts where the validity of such wills is tried, and the offices where they are registered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York. *Lyned🇪iteDatabase*, who flourished in the beginning of the 15th century, and was official to archbishop *Chichester*, interprets these hundred shillings to signify *solidos legates*; of which he tells us seventy-two amounted to a pound of gold, which in his time was valued at fifty nobles, or 16d. 13s. 4d. He therefore computes (Provinc. t. 3. t. 13.) that the hundred shillings, which constituted *bona notabilia*, were then equal in current money to 23l. 3s. 0 1-4d. This will account for what is said in our ancient books, that *bona notabilia* in the diocese of London, (4 Inst. 335. Godol. fi. 2. c. 22.) and indeed everywhere else, (Plowd. 281.) were of the value of ten pounds by composition; for, if we pursue the calculations of *Lyned🇪iteDatabase* to their full extent, and consider that a pound of gold is now almost equal to a hundred and fifty nobles, we shall extend the present amount of *bona notabilia* to nearly 70l. But the makers of the canons of 1603, understood this ancient rule to be meant of the shillings current in the reign of James I. and have therefore directed, (Can. 92.) that five pounds shall for the future be the standard of *bona notabilia*, so as to make the probate fall within the archiepiscopal prerogative. Which prerogative (properly understood) is grounded upon this reasonable foundation; that as the bishops themselves were originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other
than such as lay within their own dioceses, beyond which their
episcopal authority extends not. But it would be extremely trou-
blesome, if as many administrations were to be granted as there
are dioceses within which the deceased had bona notabilia; besides
the uncertainty which creditors and legatees would be at in case
different administrators were appointed to ascertain the fund out
of which their demands were to be paid. A prerogative is there-
fore very prudently vested in the metropolitan of each province, to
make in such cases one administration serve for all.

4. The executor or administrator is to make an inventory of all
the goods and chattels, whether in possession or action of the de-
cesed, which he is to deliver in to the ordinary upon oath, if
thereunto lawfully required. Stat. 21 Hen. VIII. c. 5. By stat. 1
Jac. II. c. 17. § 6. no administrator shall be cited into court to
render an account of the personal estate of his intestate, other-
wise than by an inventory thereof, unless at the instance of some
person in behalf of a minor, or having a demand out of such estate
as a creditor, or next of kin; nor shall be compellable to account
before any ordinary or judge empowered by the act of 22 & 23
Car. II. cap. 10. otherwise than as aforesaid. See 9 Ref. 39. 2
Inst. 600. Raym. 407.

5. He is to collect all the goods and chattels so inventoried and
to that end he has very large powers and interests conferred on
him by law, being the representative of the deceased; Co. Litt.
269. and having the same property in his goods as the principal
had when living, and the same remedies to recover them. And
if there be two or more executors, a sale or release by one of them
shall be good against all the rest. Dyer, 23. Cro. Eliz. 347.
Sid. 33. Brownl. 183. Unless such release be obtained by fraud.
Moor, 620. Cro. Eliz. 318. 2 Leon. 269. But in case of admin-
istrators it is otherwise. 1 Atk. 460. Whatever is so recovered,
that is of a saleable nature, and may be converted into ready money,
is called assets in the hands of the executor or administrator, that is,
sufficient or enough (from the French assez) to make him charge-
able to a creditor or legatee, so far as such goods and chattels ex-
tend. Whatever assets so come to his hands, he may convert
into ready money, to answer the demands that may be made upon
him. See 6 Ref. 47. Co. Litt. 374. In actions against execu-
tors, the jury must find assets to what value, for the plaintiff shall
recover only according to the value of assets found. 1 Roll. Rep.
58. As to real assets by descent, see this Dict. tit. Assets.

The chattels, real and personal, of the testator coming to the
executor, are leases for years, rent due, corn growing and cut,
grass cut and severed, &c. cattle, money, plate, household
goods, &c. Co. Litt. 118. Dyer, 130. 537. An executor hav-
ing a lease for years of land in right of the deceased, if he pur-
chase the fee, whereby the lease is extinct, yet this lease shall
continue to be assets, as to the creditors and legatees. 1 Ref.
87. Bro. Lease, 63. Though a plantation be an estate of inheri-
tance, yet, being in a foreign country, it is a chattel in the hands of
executors to pay debts. 1 Vent. 358. The executor is not only
titled to all personal goods and chattels of the testator, of what
nature soever they are, but they are also accounted to be in his
possession, though they are not actually so; for he may maintain
an action against any one who detains them from him: he is like-
wise entitled to things in action; as right of execution on a judgment, bond, statute, &c. Also to money awarded on arbitration, where the party dies before the day, &c. Co. Litt. 209. 2 Vent. 249. 1 Danw. Abr. 549.

If goods of the testator are kept from the executor, he may sue for them in the spiritual court, or at common law; and if one seized of a messuage in f. c. hath goods in the house, and makes a will and executors, and dies, the executors may enter into the house, and carry away the goods. Litt. 60. An executor may, in convenient time after the testator's death, enter into a house descended to the heir, for removing and carrying away the goods, so as the door be open, or the key be in the door. Offic. Exec. 8. He may take the goods and chattels to himself, or give power to another to seize them for him. 9 Rep. 38. If an executor with his own goods, redeem the goods of the testator; or pays the testator's debts; &c. the goods of the testator shall, for so much, be changed into the proper goods of the executor. Jenk. Cent. 188.

Where a man by will devises that his lands shall be sold for payment of debts, his executors shall sell the land, to whom it belongs to pay the debts. 2 Leon. c. 276. And if lands are devised to executors to be sold for payment of the testator's debts, those executors that act in the executorship, or that will sell, may do it without the others. Co. Litt. 113. By stat. 21 Hen. VIII. c. 4. bargains and sales of lands, &c. devised to be sold by executors, shall be as good, if made by such of the executors only as take upon them the execution of the will, as if all the executors had joined in the sale. If lands are thus devised to pay debts, a surviving executor may sell them; but if the devise be, that the executor shall sell the land, and not of the land to them to be sold, here being only an authority not an interest; if one dies the other cannot sell.

6. The executor or administrator must pay the debts of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pay those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he must pay all funeral charges, and the expenses of proving the will, and the like. Secondly, debts due to the king on record or specialty. 1 And. 129. Thirdly, such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woollen; (stat. 30 Car. II. c. 3.) money due upon poor rates, (stat. 17 Geo. II. c. 38.) for letters to the post-office, (stat. 9 Ann. c. 10.) and some others. Fourthly, debts of record; as judgments, (docketed according to the stat. 4 & s W. & M. c. 26.) statutes and recognisances. (4 Rep. 60. Cro. Cas. 363.) Fifthly, debts due on special contracts; as for rent; (for which the lessor has often a better remedy in his own hands, by distraint;) or upon bonds, covenants, and the like under seal. (Wentw. c. 12.)

Lastly, debts on simple contracts, viz. upon notes unsealed and verbal promises. Among these simple contracts, servants' wages are by some, (1 Roll. Abr. 927.) with reason preferred to any other; and so stood the ancient law according to Bracton, (lib. 2. c. 96.) and Fleta, (b. 2. c. 56. § 10.) Among debts of equal degree,
the executor or administrator is allowed to pay himself first; by retaining in his hands so much as his debt amounts to. 10 Mod. 496. If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or not; (Plowd. 184. Salk. 299.) provided there be assets sufficient to pay the testator's debts: for, though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary. Salk. 303. 1 Roll. Abr. 931. 5 Rep. 30. 8 Rep. 136. But if a person dies intestate, and the ordinary commits administration to a debtor, the debt is not thereby extinguished, for he comes in only by the act of law, not by the act of the party. 5 Rep. 135. 1 Salk. 306. See also 1 Cha. Rep. 292. Moor, 855. Hutt. 128.

If no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt; though he has nothing left for the rest, for, without a suit commenced, the executor has no legal notice of the debt. Dyer, 32. 2 Leon. 60.

Pending a bill in equity against an executor, he may pay any other debt of a higher nature, or of as high a nature, where he has legal assets: but where there is a final decree against an executor, if he pays a bond, it is a mispayment; for a decree is in nature of a judgment. 2 Salk. 507.

If there be several debts due on several bonds from the testator, his executor may pay which bond-debt he pleases, except an action of debt is actually commenced against him upon one of those bonds: and in such case, if, pending an action, another bond-creditor brings another action against him, before judgment obtained by either of them, he may prefer which he will, by confessing a judgment to one, and paying him; which judgment he may plead in bar to the other action. Vaugh. 89. See Sid. 21. But this judgment confessed must be before plea. The usual way is, if there is time, and an executor or administrator is desirous of preferring another creditor of equal degree with him who sues, instantly, before plea, to confess a judgment, and then plead it with a plenè administravit ultra.

If judgment for 100L is suffered, and the plaintiff compounding for 60L the judgment for the whole sum shall not be allowed to keep off other creditors. 8 Rep. 133. Judgments are not to be kept on foot by fraud. Sid. 230. 1 Vent. 76.

On a scire facias against an executor, he cannot plead fully administered, but must plead specially that no goods of the testator came to his hands, whereby he might discharge the debt; for he may have fully administered, and yet be liable to the debt, where goods of the testator's afterwards come to his hands. 1 Litt. 568, Cro. Eliz. 575. In scire facias against executors, upon a judgment against their testator, they plead plenè administravit, by paying debts upon bonds ante notitiam: It was adjudged no plea, for at their peril they ought to take notice of debts upon record, and first pay them; and though the recovery be in another county than that where the testator lived: but where an action is brought against executors in another county than where they live, and they not knowing thereof, pay debts upon specialty, it is good. Cro. Eliz. 793.
Where day of payment is past, the penalty of a bond is the sum due at law; but where the day of payment is not come, the sum in the condition is the debt, and the executor cannot cover the assets any further. *The Bank of England v. Morrice, widow, Annaly*, 224.

A bill may be exhibited in the chancery against an executor, to discover the testator's personal estate; and thereupon he shall be decreed to pay debts and legacies. *Abr. Ca. Eq.* 238. If a person being executor and his testator greatly indebted, be disposed to pay the assets as far as they will go, and that his payments may not be afterwards questioned, he may bring a bill in equity against all the testator's creditors, in order that they may, if they will, contest each other's debts, and dispute who ought to be preferred in payment. 2 *Vern.* 37.

Where there are only *equitable assets*, they must be equally paid amongst all the creditors; for a debt by judgment and simple contract is in conscience equal. 2 *P. Wms.* 416. As to what are legal, and what equitable assets, see *Vin. Abr.* tit. *Payment*. And it is held, that bonds and other debts shall be paid equally by executors, where a person has devised lands to them to be sold for the payment of his debts. 1 *P. Wms.* 430.

A debt devised by the testator is not to be paid by the debtor to the legatee, but to the executor, who can give a sufficient discharge for it, and is answerable to the legatee if there be sufficient assets. If an executor pays out the assets in legacies, and afterwards debts appear, of which he had no notice, which he is obliged to pay, the executor, by bill in chancery, may force the legatees to refund. *Chan. Rep.* 135. 149. One legatee paid shall refund against another, and against a creditor of the testator, that can charge the executor only in equity: but if an executor pays a debt upon simple contract, there shall be no refunding to a creditor of a higher nature. 2 *Vern.* 360.

The following extracts from Mr. Cox's admirable notes to his edition to *Pierie Williams's Reports*, (1 *P. Wms.* 294. 679.) will serve as a general summary or abridgment of the determinations relative to the application of the different funds of a testator's estate, in payment of his different debts.


Every loan creates a debt from the borrower, whether there be a bond or covenant for payment or not. *Cope v. Cope*, 3 *Salk.* 449.
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So lands subject to or devised for payment of debts, shall be liable to discharge such mortgaged lands, either descended or devised. Bartholomew v. May, 1 Atk. 487. Tweedale (MS.) v. Coventry, (E.) 1 Bro. C. R. 240. Even though the mortgaged lands be devised expressly subject to the encumbrance. 2 P. Wms. 366. Serle v. St. Elayo. So lands descended shall exonerate mortgaged lands devised. Galton v. Hancock, 2 Atk. 424. So unencumbered lands and mortgaged lands, both being specifically devised, (but expressly "after payment of all debts,") shall contribute in discharge of such mortgage. Carter v. Barnardiston, 1 P. Wms. 505. 2 Bro. P. C. 1.


With respect to the priority of application of real assets, when the personal estate is either exempt or exhausted, it seems that, first, the real estate expressly devised for payment of debts shall be applied: secondly, to the extent of specialty debts, the real estate descended: thirdly, the real estate specifically devised, subject to a general charge of debts. Galton v. Hancock, 2 Atk. 424. Powis v. Corbett, 3 Atk. 566. Wride v. Clarke, 2 Bro. C. R. 261. n. Davies v. Tofts, id. 259. a. Donay v. Lewis, id. 257.

It being the object of a court of equity that every claimant upon the assets of a deceased person shall be satisfied, as far as such assets can, by any arrangement consistent with the nature of the respective claims, be applied in satisfaction thereof; it has been long settled, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien. Laney v. Athol, (D.) 2 Atk. 446. Lacam v. Mertins, 1 Vez. 312. Moggy v. Hodges, 2 Vez. 53.

If therefore a specialty creditor, whose debt is a lien on the real assets, receive satisfaction out of the personal assets, a simple
contract creditor shall stand in the place of the specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debt. 2 C. C. 4. Sagitary v. Hyde, 1 Vern. 455. Newe v. Alderton, 1 Eq. Abr. 144. Wilson v. Fielding, 2 Vern. 763. Galton v. Hancock, 2 Atk. 436. And legatees shall have the same equity as against assets descended. Culpepper v. Aston, 2 C. C. 117. Bowman v. Reeve, Pre. Ch. 578. Tipping v. Tipping, 1 P. Wms. 730. Lucy v. Gardner, Bunb. 137. Lukins v. Leigh, Tulp. 54. So where lands are subject to payment of all debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of personal assets. Haslewood v. Pope, 3 P. Wms. 323. So where legacies by will are charged on the real estate, but not the legacies by codicil, the former shall resort to the real assets upon a deficiency of the personal assets to pay the whole. Masters v. Masters, 1 P. Wms. 422. Bligh v. Darney, (L.) 2 P. Wms. 620. Hyde v. Hyde, 3 C. R. 83.

But from the principles of these rules it is clear, that they cannot be applied in aid of one claimant, so as to defeat the claim of another, and therefore a pecuniary legatee shall not stand in the place of a specialty creditor, as against land devised, though he shall as against land descendent. Scott v. Scott, Amb. 363. Clifton v. Burt, 1 P. Wms. 678. and Haslewood v. Pope, 3 P. Wms. 324. But such legatee shall stand in the place of a mortgagee who has exhausted the personal assets to be satisfied out of the mortgaged premises, though specifically devised. Lukins v. Leigh, Tulp. 53. Forrester v. Ld. Leigh, Amb. 171. For the application of the personal assets, in case of the real estate mortgaged, does not take place to the defeating of every legacy. Oneal v. Mead, 1 P. Wms. 693. Tipping v. Tipping, id. 730. Davies v. Gardner, 2 P. Wms. 190. Ryder v. Wager, id. 335.

It is now settled that the court of chancery will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal chattels, it being void so far as it touches any interest in land. Mogg v. Hodges, 2 Vez. 52. Attorney-General v. Tyndal, Amb. 614. Foster v. Blagden, Amb. 704. Hilyard v. Taylor, Id. 713. II. and it is to be observed, that none of the rules abovementioned subject any fund to a claim to which it was not before subject, but only take care that the election of one claimant shall not prejudice the claims of the others. 2 Atk. 438. 1 Vez. 312.

Some of the questions heretofore much agitated respecting the application of real assets, are set at rest by the act 47 Geo. III. st. 2. c. 74. for more effectually securing the payment of the debts of traders. By this act it is provided, that when any person being, at the time of his death, a trader within the meaning of the bankrupt laws, shall die seised of or entitled to any real estate, which he shall not by his last will have charged or devised for payment of his debts, and which would have been assets for payment of debts due on any specialty, in which heirs were bound, such real estate shall be assets to be administered in courts of equity for payment of all debts, as well debts due on simple contract as on specialty; and that the heir at law and devisees shall be liable to suits in equity accordingly; provided that creditors by special-
ty, in which heirs are bound, shall be fully paid in preference to creditors by simple contract, or by specialty, in which heirs are not bound.

7. When the debts are all discharged, the legacies claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts. 2 Vern. 434. 2 P. Wms. 23. See tit. Legacy. The assent of an executor to legacies is held necessary to entitle the legatee; but as this assent may be compelled, see March. 97. it does not seem necessary to state the effect of a dissent where there are assets sufficient to answer both debts and legacies. Where there are not assets, the assent of the executor to a legacy would subject him to a devestavit. See Co. Litt. 111. Keilw. 128. Perk. 570. Plowd. 525. 543. 4 Rep. 28. Cro. Eliz. 719. and this Dict. tit. Legacy.

8. When all the debts and particular legacies are discharged, the surplus or residuum must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor’s own use, by virtue of his executorship. Perkins, 525. But whatever ground there might have been formerly for it, this opinion seems now to be understood, with the following restriction; that although where the executor has no legacy at all, the residuum shall in general be his own; yet wherever there is sufficient on the face of a will (by means of a competent legacy or otherwise) to imply that the testator intended his executor should not have the residue, the undivided surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator. Prec. Chanc. 323. 1 P. Wms. 7. 544. 2 P. Wms. 338. 3 P. Wms. 43. 194. Stra. 559. Lawson v. Lawson, Dom. Proc. 28 April, 1777.

The result of the many cases on this subject, (as ingeniously stated in a note of Mr. Cox’s, to his edition of P. Wms. vol. 1. p. 550.) appears to be this.

By law the appointment of an executor vests in him beneficially, all the personal estate of the testator not otherwise disposed of; but wherever courts of equity have seen, on the face of the will, sufficient to convince them that the testator did not intend the executor to take the surplus, they have turned the executors into trustees for those on whom the law would cast the surplus, in case of a complete intestacy, i.e. the next of kin; as where the executors are expressly called executors in trust, or where any other expressions occur, showing the office only to be intended them, and not the beneficial interest. Pring v. Pring, 2 Vern. 99. Rachfield v. Careless, 2 P. Wms. 158. Graydon v. Hicks, 2 Atk. 18. Dean v. Dalton, 2 Bro. C. R. 534. Bennet v. Bachelor, 3 Bro. C. R. 28. So where there is a residuary clause, but the name of the residuary legatee is not inserted. Wheeler v. Sheers, Mosel. 288. Cloyne (Bishop) v. Young, 2 Vez. 91. North (Lord) v. Purdon, 2 Vez. 495. Or where the residuary legatee dies in the life-time of the testator. Nichols v. Crisp, Amb. 769. Bennet v. Bachelor, 3 Bro. C. R. 28.

So a pecunary legacy to a sole executor affords a sufficient argument to exclude him from the residue; as it is absurd to sup-
pose a testator to give expressly a part of the fund to the person he intended to take the whole. *Cook v. Walker,* cited 2 *Vern.* 676. *Joshin v. Brewett,* *Bunb.* 112. *Davers v. Dewes,* 3 *P. Wms.* 40. And it is settled (notwithstanding the case of *Bail v. Smith,* 2 *Vern.* 675.) that the wife being the executrix shall make no difference, as appears as well by the cases mentioned in *Farrington v. Knightley,* (1 *P. Wms.* 544. et seq.) as by 2 *Eq. Abr.* 444. p. 58. *Martin v. Rebow,* 1 *Bro.* C. R. 154. So equal pecuniary legacies to two or more executors shall exclude them from the surplus. *Petit v. Smith,* 1 *P. Wms.* 7. and the several cases there mentioned, and 3 *Bro.* C. R. 110. Neither will legacies to the next of kin vary the rule. *Andrew v. Clark,* 2 *Vez.* 162.


Then, as to *specific* legacies, it is determined, that a specific legacy will exclude a sole executor; *Randal v. Bookey,* 2 *Vern.* 435. *Southat v. Watson,* 3 *Atk.* 226. *Martin v. Rebow,* 1 *Bro.* C. R. 154. but that distinct specific legacies of unequal value to several executors, shall not exclude them. *Bánkborne v. Feast,* 2 *Vez.* 27. And the language of Lord *Hardwicke in Southat v. Watson,* treats specific and pecuniary legacies as standing precisely upon the same ground in questions of this nature. See tit. *Legacy.*

However, no case occurs in the books in which *distinct specific* legacies of equal value to several executors have excluded them from the surplus. And the argument which supports this rule as to *pecuniary,* certainly does not apply with equal force to *specific* legacies; since it is very probable that a testator may wish to distribute specific quantities of stock, or particular debts, &c. &c. amongst his executors in some particular manner; although equally, in point of value, and consistently with an intention that they should take the surplus. The case of *Strangton v. Stanhope,* cited 3 *Atk.* 230. is not a case of *distinct specific* legacies; for it appears from *Reg. Lib. B.* 1736, fo. 104. that the testator there gave some specific legacies to a man and his wife jointly, whom
he also made his executors. And so in Willis v. Brady, Barn. 64.
and these cases therefore seem like legacies to a sole executor.

With regard to the admission of parol evidence in cases of this
kind, see Rackfield v. Careless, 2 P. Wms. 158. and Ruland (D.) v.
Ruland, (Dss.) 2 P. Wms. 210. and Mr. Cox's notes on the former
of those cases.

Concerning the administrator, indeed, there was formerly much
debate, whether or no he could be compelled to make any dis-
tribution of the intestate's estate. Godolphin's 2. e. 32. For though
(after the administration was taken in effect from the ordinary,
and transferred to the relations of the deceased,) the spiritual
court endeavoured to compel a distribution, and took bonds
of the administrator for that purpose, they were prohibited by the
temporal courts, and the bonds declared void at law. 1 Lev. 233.
Cart. 125. 2 P. Wms. 447. And the right of the husband not
only to administer, but also to enjoy exclusively, the effects of his
deceased wife, depends still on this doctrine of the common law:
the statute of frauds declaring only, that the statute of distribution
does not extend to this case. But now these controversies are
quite at an end; for by the statute commonly called the statute of
distribution, 22 & 23 Car. II. e. 10. (explained by 29 Car. II. e. 30.)
it is enacted, that the surplusage of intestates' estates (except of
femae coeverts, which are left as at common law, stat. 29 Car. II. e.
3. § 25.) shall, after the expiration of one full year from the death
of the intestate, be distributed in the following manner: one third
shall go to the widow of the intestate, and the residue, in equal
proportions, to his children, or if dead, to their representatives,
that is, their lineal descendants: if there are no children or legal
representatives subsisting, then a moiety shall go to the widow, and
a moiety to the next of kindred in equal degree, and their represen-
tatives; if no widow, the whole shall go to the children; if
neither widow nor children, the whole shall be distributed among
the next of kin in equal degree, and their representatives: but no
representatives are admitted among collaterals farther than the
children of the intestate's brothers and sisters. Raym. 496. Lord
Raym. 571.

The next of kindred here referred to are to be investigated by
the rules of consanguinity, as those who are entitled to letters of
administration, of whom sufficient has already been said, (ante,
III.) And therefore, by this statute, the mother, as well as the
father, succeeded to all the personal effects of their children, who
died intestate, and without wife or issue; in exclusion of any bro-
thers and sisters of the deceased. And so the law still remains
with respect to the father; (see 1 P. Wms. 45.) and the father
need not administer. (Pr. Ch. 260.) But by stat. 1 Jac. II. e. 17.
if the father be dead, and any of the children die intestate, with-
out wife or issue, in the life-time of the mother, she and each of
the remaining children, or their representatives, shall divide his
effects in equal portions. And in case a man die, leaving a wife
and a mother, and brothers and sisters, the wife shall have only a
moiety, the remainder going to his mother, brothers, and sisters
equally. 2 P. Wms. 344.

This statute of distribution bears, in its principle, a near re-
semblance to our ancient English law previous to the statute of
wills, by which (see Glanville, l. 2. c. 5. Brother, l. 2. c. 26. Fleta, l. 2. c. 57.) a man's goods were to be divided into three equal parts; of which, one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children. And so if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts; and the writ de ratione habili parte honorum was given to recover them. Fitz. N. B. 122.

By the same statute of distributions it is directed, that no child of the intestate, (except his heir at law,) on whom he settled in his life-time any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall have so much only as will make them equal. And this with respect to goods and chattels is part of the ancient custom of London, of the province of York, and of Scotland; and with regard to lands descending in coparcenary, that it hath always been, and still is, the common law of England; under the name of hutchpot.

It may be observed that the doctrines and limits of representation, laid down in the statute of distribution, seem to have been in some measure also borrowed from the civil law; whereby it will sometimes happen, that personal estates are divided per capita, and sometimes per stirpes; whereas the common law knows no other rule of succession but that per stirpes only. They are divided per capita, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not jure representationis, in the right of another person. As if the next of kin be the intestate's three brothers, A. B. and C., here his effects are divided into three equal portions, and distributed per capita, one to each; but if one of these brothers, A., had been dead, leaving three children, and another, B., leaving two, then the distribution must have been per stirpes, viz. one third to A.'s three children, another third to B.'s two children, and a remaining to C. the surviving brother: yet if C. had also been dead, without issue, then A.'s and B.'s five children, being all in equal degree to the intestate, would take in their own rights per capita, viz. each of them one-fifth part. Prev. Chanc. 54.

A question hath been made, if a father die intestate, leaving only one son, which son also dies intestate, whether administration should be granted to the next of kin, of the father or of the son? The latter determination hath been, that, by this statute of distribution of intestates' estates, a right is vested in one child, where there is one and no more, (viz. a right to sue for the estate; and by consequence, if he die before the estate is recovered, and actually in his possession, it must go to his administrator, and not to the administrator of the father. Palmer v. Alcock, 3 Mod. 58. Vide Shower, 26. and 2 Vern. 274.

So where a person died intestate, leaving two, who were next kin, in equal degree to him; one of them died intestate within the year, and before distribution; adjudged, that an interest was
vested in him, and his next of kin shall have the administration, like the case of a residuary legatee dying before probate of the will, (viz.) his next of kin shall have the administration, and the next of the testator. Show. 25.

9. The statute of distributions expressly excepts and reserves the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates’ effects. So that, though in those places the restraint of devising is removed, their ancient customs remain in full force with respect to the estates of intestates.

In the city of London, (Lord Raym. 1329.) and province of York, (2 Burn’s Eccl. Law, 746.) as well as in the kingdom of Scotland, (Ibid. 782.) and probably also in Wales, (concerning which there is little to be gathered, but from the stat. 7 & 8 Wm. III. c. 38.) the effects of the intestate, after payment of his debts, are in general divided according to the ancient universal doctrine of the pars rationabilis. If the deceased leaves a widow and children, his substance, (deducting for the widow her apparel, and the furniture of her bed-chamber, which in London is called the widow’s chamber) is divided into three parts, one of which belongs to the widow, another to the children, and the third to the administrator; if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other. 1 P. Wms. 341. Salk. 245. If neither widow nor child, the administrator shall have the whole. 2 Show. 175. And this portion, or dead man’s part, the administrator was wont to apply to his own use, (2 Freem. 85. 1 Vern. 132.) till the stat. 1 Jac. II. c. 17. declared, that the same should be subject to the statute of distribution. So that if a man dies worth 1,800l. personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom, and two by the statute; and each of the children five, three by the custom, and two by the statute; if he leaves a widow and one child, she shall have still eight parts, as before, and the child shall have ten, six by the custom, and four by the statute; if he leaves a widow, and no child, the widow shall have three-fourths of the whole, two by the custom, and one by the statute; and the remaining fourth shall go, by the statute, to the next of kin. It is also to be observed, that if the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of nonentity, with regard to the custom only; (2 Vern. 665. 3 P. Wms. 16.) but she shall be entitled to her share of the dead man’s part under the statute of distribution, unless barred by special agreement. 1 Vern. 15. 2 Chan. Ref. 252. And if any of the children are advanced by the father in his lifetime with any sum of money, (not amounting to their full proportionable part,) they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom; (2 Freem. 279. 1 Eq. Cas. Abr. 159. 2 P. Wms. 526.) but if they are fully advanced, the custom entitles them to no farther dividend. 2 P. Wms. 527.

Thus far, in the main, the customs of London and of York agree: but besides certain other less material variations, there are
two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament; (2 Vern. 538.) and if they die under that age, whether sole or married, their share shall survive to the other children; but after the age of twenty-one it is free from any orphanage custom; and in case of intestate, shall fall under the statute of distributions. Prec. Chanc. 537. The other, that in the province of York, the heir at common law, who inherits any land, either in fee or in tail, is excluded from any filial portion or reasonable part. 2 Burn. 754.

VI. 1. Against an administrator and for him, action will lie, as for and against an executor, and he shall be charged to the value of the goods, and no further; unless it be by his own false plea, or by wasting the goods of the intestate. An executor or administrator shall never be charged de bonis propriis, but where he doth some wrong; as by selling the testator's goods, and converting the money to his own use, concealing or wasting them, or by pleading what is false. Dyer, 210. 2 Roll. Rep. 295. But this plea must be of a fact within his own knowledge. If an administrator plead plene administravit, and it is found against him, the judgment shall be de bonis propriis, because it is a false plea, and that upon his own knowledge. 2 Cro. 191. Contra where he pleads such a plea, and that he hath no more than to satisfy such a judgment, &c. the recovery shall be de bonis testatoris, &c. 2 Roll. Rep. 400. This must mean where such plea is true in fact. Upon plene administravit pleaded by an administrator, the plaintiff must prove his debt, or he shall recover but a penny damages, though there be assets; because the plea only admits the debt, but not the quantum. 1 Salk. 296.

Special bail is not required of administrators or executors in any action brought against them for the debt of the intestate; except where they have wasted the goods of the deceased; nor shall costs be had against them. Vide tit. Costs. See Cro. Eliz. 508. Yeve. 168. Hut. 69. 2 Roll. Rep. 87. 1 Salk. 207. 3 Salk. 108. Not even on a writ of error where judgment is affirmed. Where an administrator is plaintiff, he must show by whom administration was granted; for that only entitles him to the action: but if an administrator is defendant, the plaintiff need not set forth by whom administration was granted, for it may not be within his knowledge. Sid. 228. 1 Luiz. 301. Generally an administrator shall be charged by others for any debt or duty due from the deceased, as he himself might have been charged in his life-time; so far as he hath any of the intestate's estate to discharge the same. Co. Litt. 219. Dyer, 14.

If a man have judgment for land in a real or mixed action, and for damages, and then dies, his executor or administrator, not the heir, shall have execution for the damages, but not for the land. Fitz. Admin. 55. March, 9.

2. For the goods of the testator, taken from them, or for trespass upon the land, &c. executors may, before the will proved, bring action of trespass, detinue, &c. And if they sell cattle, or other goods of the testator, before the will is proved, they may have
actions for the money payable, before the same is proved. Offic. Exec. 35. It has been ruled, that an executor may commence an action before probate; but he cannot declare upon it without producing in court the letters testamentary: he is not like an administrator, who hath no right till administration committed; for his right is the same before as after probate of the will, and the not proving it is only an impediment to the action. 1 Salk. 303.

[Probate obtained before trial of the action seems sufficient, unless oyer of the letters testamentary is demanded; for it is of the will, not the probate, profert is made; and on the trial, for any matters relative to the personal estate, with which the executors have to do, the probate is the proper proof of the will. J. M.]

Executors may maintain action of trover for goods converted in the life of the testator. Cro. Eliz. 377. And by the stat. Westm. 3. (13 Edw.) c. 23. executors shall have a writ of account, and the like action and process, as the testator might have had. By stat. 4 Edw. III. c. 7. the executors may bring actions for trespass done to their testator, as for goods and chattels carried away in his life, and shall recover their damages in the same manner as he should have done. By stat. 25 Edw. III. st. 5. c. 5. executors of executors shall have actions of debt, account, and of goods taken away of the first testator's; and have execution of statutes, &c. and shall answer to others, so far as they recover goods of the first testator, as the first executor's. As to process against executors, see stat. 9 Edw. III. c. 3.

Formerly if an executor wasted goods, and left an executor, and died leaving assets, his executor should not be chargeable, because it was a personal tort; 2 Lev. 120. but now it is otherwise by the stat. 4 & 5 W. & M. c. 24.

The law subjects the executors to every person's claim and action, which he had against the testator, except as to a trespass vi et armis, &c. committed by the testator; for which reason the executor is said to be the testator's assignee, and to represent the person of the testator; but for personal wrongs done by the testator to the person, or goods, &c. of another, the executor doth not represent him; because personal actions die with the person. Co. Litt. 209. 9 Rep. 89. See tit. Action.

Nothing can be debt in the executor, which was not debt in the testator. Cro. Eliz. 232. A promise to pay to an executor, when the testator is not named, is not good. Cro. Jac. 570. But a testator may bind his executors as to his goods, though he himself is not bound. Ibid. And an executor may recover a duty due to the testator, though he be not named. Dyer, 14. Action lies against an executor upon a collateral promise made and broken by the testator. Cro. Jac. 663. The testator's assumptit to do any collateral thing, as to build a house, &c. which is not a debt, binds executors. Jenk. Cent. 290. 336. Assumptit lies upon a contract of the testator; and the reason is the same upon a promise, where the testator had a valuable consideration. Palm. 329. Though a debt upon a simple contract of the testator, cannot be recovered of the executor by action of debt, yet it may by assumptit. 1 Lev. 300. 9 Reph. 87.

If two persons are jointly bound, and one of them dies, the survivor only shall be charged, and not the other's executor. Posch.
16 Car. II. When there are two executors, if one of them dies, action is to be brought against the surviving executor, and not the executor of the deceased; but in equity the testator's goods are liable in whosoever hands they are. 1 Leon. 304. Chan. Ref. 57.

If there be no assets, the obligee executor may sue the heir of the obligor testator in action of debt upon his bond. 1 Salk. 304. 1 Litt. Abr. 575.

If an executor releases all actions, suits, and demands, it extends only to demands in his own right, not such as he hath as executor. Show. 153. An executor shall be charged with rent in the detinet, if he hath assets; and if he continues the possession, he shall be charged in the debet and detinet, in respect of the perception of the profits, whether he hath assets or not. 1 Lev. 127. But an executor is not liable in the debet and detinet for part, and in the detinet for the other part, because they require several judgments, viz. de bonis propriis for the debet and detinet, and de bonis testatoris for the detinet. 5 Lev. 74. See tit. Debet and Detinet.

If an executor has a term, and the rent reserved is more than the value of the premises, in action brought against him for it in the debet and detinet, he may plead the special matter, viz. That he hath no assets, and that the lands is of less value than the rent, and demand judgment if he ought not to be charged in the detinet tantum; and he cannot waive the lease without renouncing the whole executorship. 1 Salk. 297.

One executor cannot regularly sue another at law; but he may have relief in equity: in the eye of the law all are but as one executor; and most acts done by, or to any of them, are esteemed acts done by, or to all of them. 1 Roll. Abr. 918. If where one executor is sued, he plead that there is another executor, he ought to show that he hath administered. 1 Lev. 161. And he only that administers is to be sued in actions against executors; but actions brought by executors are to be in the name of all of them, though some do not take upon them the executorship. 1 Roll. 924. Jenk. Cent. 106, 107. If any executor refuses to join in an action with his coexecutors, he must be summoned and severed.

An executor is not disabled by outlawry to sue for the debts of the testator.

By the stat. of Frauds, 29 Car. II. c. 3. no action shall charge an executor to answer damages out of his own estate, upon any promise to another, unless there be some writing thereof signed by the party to be charged therewith. See Rann v. Hughes; 4 Bro. P. C.

By stat. 17 Car. II. c. 8. § 1. on any judgment after verdict, had by or in the name of an executor or administrator; an administrator de bonis non may sue forth a seire facias, and take execution upon such judgment. If an executor makes himself a stranger to the will of the testator, or pleads ne unques executor, or any falsa plea, and it is found against him, judgment shall be de bonis propriis; in other cases de bonis testatoris. Cro. Jac. 447.

If on a seire facias against an executor, the sheriff return a dovastavit, the plaintiff shall have judgment and execution de bonis propriis of the defendant; and if nulla bona be returned, he may
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have a capias ad satisfaciendum or an elegit. 2 Nels. 791. Dyer, 185. But one executor shall not be charged with a devastavit made by his companion; for the act of one shall charge the other no further than the goods of the testator in his hands amount to. Cro. Eitz. 318.

If an executor does any waste, or misemploys the estate of the deceased, or doth any thing by negligence or fraud, &c. it is a devastavit, and he shall be charged for so much out of his own goods. 3 Rep. 133. And a new executor may have an action against a former executor, who wasted the goods of the deceased, or the old one may remain chargeable to creditors, &c. Hob. 266.

If an executor takes an obligation in his own name, for a debt due by simple contract to the testator, this shall charge him as much as if he had received the money; for the new security hath extinguished the old right, and is quasi a payment to him. Off. of Ex. 158. Yelv. 10. 1 Lev. 189.

So if the executor sues a person in trover and conversion, in which he has a right to recover; and afterwards he and the defendant come to an agreement, that he shall pay the executor such a sum at a future day, and the party fails, this is a devastavit, and he shall answer ad valorem. 2 Lev. 189. 2 Jones, 82. S. C. 1 Vern. 474. S. C.

It is a devastavit to permit interest to run in arrear, and then suffer judgment for it; and want of assets to pay before the incurring of it by the administrator shall not be intended unless it be expressly pleaded. 2 Lev. 40. Hil. 23 & 24 Car. II. B. R. Seam. v. Dee.

An executor in case of a devastavit is in nature of a trustee of an estate. Chan. Cas. 304.

EXECUTORY ESTATE, Is where an estate in fee, created by deed or fine, is to be afterwards executed by entry, livery, writ, &c. Leases for years, rents, annuities, conditions, &c. are called inheritances executory. Wood's Inst. 293. Estates executed, are when they pass presently to the person to whom conveyed, without any after act. 2 Inst. 513. See tit. Estate.

EXECUTORY DEVISE, The devise of a future interest. A devise that vests not at the death of the testator, but depends on some contingency which must happen before it can vest. 1 Ey. Cas. Abr. 486.

An executory devise differs from a remainder in three very material points; 1. That it needs not any particular estate to support it; 2. That by it a fee-simple or other less estate may be limited after a fee-simple; 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same. See tit. Remainder, and 2 Comm. 172—175.

1. The first case happens when a man devises an future estate to arise upon a contingency; and, until that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heir at law. As if one devises land to a feme sole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular estate to support it; a freehold commencing in futuro. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise. 1 Sid.
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153. For, since by a devise a freehold may pass without corporal tradition or livery of seisin, (as it must do if it passes at all,) therefore it may commence \textit{in futuro}; because the principal reason why it cannot commence \textit{in futuro} in other cases, is the necessity of actual seisin, which always operates \textit{in praesenti}. And, since it may thus commence \textit{in futuro}, there is no need of a particular estate to support it, the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows, that such an executory devise not being a present interest, cannot be barred by a recovery, suffered before it commences. \textit{Cro. Jac. 593}. See this \textit{Diu. tit. Fine and Recovery}.

2. By executory devise, a fee, or other less estate, may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises lands to \textit{A.} and his heirs; but, if he dies before the age of twenty-one, then to \textit{B.} and his heirs; this remainder also, though void in a deed, is good by way of executory devise. \textit{2 Mod. 289}.

In both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time, as within one or more life or lives in being, or within a moderate term of years; for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors. \textit{12 Mod. 287}. \textit{1 Vern. 164}. \textit{1 Salk. 229}. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a \textit{feme covert} as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son, and this hath been decreed to be a good executory devise. \textit{Forr. 232}. This limit was taken from the time in which an estate may be rendered unalienable by a strict settlement. An executory devise to an unborn son of a \textit{man}, may be suspend-ed a few months beyond the life of the father, and twenty-one years afterwards, by a posthumous birth.

3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed: for, by law, the first grant of it to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term for years. \textit{8 Rep. 95}.

And, at first, the courts were tender, even in the case of a will, of restraining the devise for life from alienating the term, but only held, that in case he died without exerting that act of ownership, the remainder over should then take place; for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. \textit{Bro. tit. Chattels, 23}. \textit{Dyer, 74}. But, soon afterwards it was held, that the devisee for life hath no power of alienating the term; so as to bar the remainder-man; \textit{Dyer, 358}. \textit{8 Rep. 96}, yet, in order to prevent the danger of perpetui-ties, it was settled, that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet
they must all be *in esse* during the life of the first devisee; for then, as it is expressed, all the candles are lighted, and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest. It was also settled that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee. 1 Sid. 451. Skinn. 341. 3 P. Wms. 358. See post, II.

Having said thus much on executory devises in general, subsequent information may be thus divided:

I. Of Executory Devises of Lands of Inheritance.
II. Of Executory Devises of Terms for Years, and of personal Goods and Chattels.

I. It is a settled rule of law, that where the court can construe a devise to be a contingent remainder, they will never construe it to be an executory devise. 2 Bos. & Pull. 298. See tit. Remainder II. If a particular estate is limited, and the inheritance passes out of the donor, this is a contingent remainder; but where the fee by a devise is vested in any person, and to be vested in another by contingency, this is an executory devise; and in all cases of executory devises, the estates descend until the contingencies happen. Raym. 28. 1 Lutn. 798. Where a contingent estate limited, depends upon a freehold, which is capable of supporting a remainder, it shall never be construed an executory devise, but a remainder. And so it is if the estate be limited by words *in praesentia*, as when a person devises his lands to the heirs of A. B. who is living, &c. Though if the same were to the heir of A. after his death, it would be as good as an executory devise. 2 Saund. 380. 4 Mod. 235.

One by will devises land to his mother for life, and after her death, to his brother in fee; provided, that if his wife, being then surviving, be delivered of a son, then the land to remain to him in fee, and dies, and the son is born; in this case it was held, that the fee of the brother shall cease, and vest in the son, by way of executory devise, on the happening of the contingency; and here such fee estate enures as a new original devise to take effect when the first fails. Dyer, 33. 127. Cro. Jac. 592. A remainder of a fee may not be limited by the rules of law after a fee-simple; for when a man hath parted with his whole estate, there cannot remain any thing for him to dispose of: but of late times a distinction hath been made between an absolute fee-simple, and a fee-simple which depends upon a contingency, or is conditionally limited; especially where such a contingency may happen in the course of a few years, or of one or two lives; and where such a remainder is limited by will, it is called an executory devise. 2 Neis. Abr. 797.

An estate devised to a son and his heirs, upon condition that if he did not pay the legacies given by the will within such a time, that then the land should remain to the legatees, &c. and their heirs; this limitation of a *fee in remainder*, after a *fee limited to the son*, being upon the contingency of the son’s failing in payment of the legacies, was adjudged good by way of executory devise. Cro. Eliz. 833. And where the father devised his lands to his youngest
son and his heirs, and if he die without issue, the eldest son being alive, then to him and his heirs; this was held a good remainder in fee to the eldest brother, after the conditional contingent estate in fee to the youngest, as depending upon the possibility that he might be alive when his youngest brother died without issue; and his dying without issue was a collateral determination of his estate, whilst the other was living. Godb. 282. 2 Nels. Abr. 798.

There can be no executory devise after an estate-tail generally limited, because that would tend to a perpetuity; and a contingency is too remote where a man must expect a fee upon another's dying without issue, generally: but dying without issue, living another, may happen in a little time, because it depends upon one life; and therefore a devise of a fee-simple to one, but to remain to another upon such a contingency, is now held good by executory devise. Cro. Jac. 695.

If a devise be to A. for ever, that is, if he shall have a son or sons who shall attain 21, but if A. shall die without son or sons to inherit, that the son of B. shall inherit: this is a fee in A. with an executory devise to the son of B. who shall take if A. die without issue, or if the issue die before 21. 1 Bro. C. R. 147.

If a devise be to the second son, then unborn, of A. B. and after his decease, or accession to his paternal estate, then to his second son and his heirs male, with remainders over: such second son of A. B. when born, will take an estate in tail-male by way of executory devise, determinable on the accession of the family estate, and in the mean time the lands descend to the heir of the testator. 2 Black. Ref. 1159.

By 39 & 40 Geo. III. c. 98. reciting, “that it is expedient that all dispositions of real or personal estates, whereby the produce and profits thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to certain restrictions,” it is enacted, that no person shall, by deed or will, settle or dispose of any real or personal property, in such manner that the rents or profits shall be accumulated, for a longer term than the life of the settler, or twenty-one years after his decease, or during the minority of any party living, (or in ventre suo morit, at the time of such decease, or the minorities of parties beneficially entitled: all directions on the contrary are declared void, and the rents, &c. are to go to the parties who would be entitled if such accumulation were not directed. This act does not extend to provisions for payment of debts, or for raising portions for children, or respecting the produce of timber; nor to the disposition of heritable property in Scotland.

II. It has now been long fully settled, that a term for years, or any chattel interest, may be given by an executory devise to an unborn child of a person in existence, when it attains the age of 21; and that the limits of executory devises of real and personal property are precisely the same. Fearne. See ante, I.

It is very common to bequeath chattel interests to A. and his issue, and if he dies without issue to B. It seems now to be determined, that where the words are such as would have given A. an estate tail in real property; in cases of personal property the subsequent limitations are void, and A. has the absolute interest: but if it appear from any clause or circumstance in the will, that
the testator intended to give it over only in case A. had no issue living at the time of his death, upon that event the subsequent limitation will be good as an executory devise. See Pearson, and the cases referred to in Cox's P. Wms. iii. 252.

Formerly where a term of years (which is but a chattel) was devised to one; and that if he died, living another person, it should remain to the other person during the residue of the term, such a remainder was adjudged void: for a devise of a chattel to one for an hour, was a devise of it for ever. Dyer, 74. But it was afterwards held, that a remainder of a term to one, after it was limited to another for life, was good: in a case where a testator having a term, devised that his wife should have the lands for so many years of the term she should live, and that after her death the residue thereof should go to his son and his assigns; and this was the first case wherein an executory remainder of a term for years was adjudged good. Dyer, 233, 338.

A person possessed of a term, devised it to his wife for eighteen years, and after to his eldest son for life, after to the son's eldest issue male during life; though he have no such issue at the time of the devise, and death of the devisor, if he has before his own death, he shall have it as an executory devise. 1 Roll. 612. But if one devise a term to his wife for life, the remainder to his first son for life, and if he dies without issue, to his second son, &c. the remainder to the second son is void, and no executory devise; yet where the dying without issue living at a person's death, may be confined to one life, it hinders not a remainder over. 1 Eq. Abr. 194.

Where there is an executory devise there needs not any particular estate to support it; and because the person who is to take upon contingency, hath not a present but future interest, his estate cannot be barred by a common recovery. 2 Nels. Abraham, 797, 798. It is held executory devises, and limitations of the trust of a term, are governed alike. 1 Vern. 234.

The husband being possessed of a term for years, devised the lease itself to his wife for her life, and after her death to her children unpreferred; it was insisted for the wife, that she had the whole term, the devise being of the lease itself, and the lands are not mentioned throughout the will; but adjudged that the wife had only an estate for so many years of the lease as she should live, and that so much as remained unexpired at her death, was to vest in the children upon the contingency of their living at that time. 1 And. 61. 2 Leon. 92. 3 Leon. 99. Gold. 26.

By the rules of the ancient common law there could be no future property, to take place in expectancy, created in personal goods and chattels: because, being things transitory, it would occasion many suits and quarrels, and put a stop to the freedom of trade, if such limitations were generally allowed. But yet in last wills and testaments such dispositions were permitted; though, originally, that indulgence was only shown when merely the use of the goods, and not the goods themselves, were given to the first legatees; the property being supposed to continue in the executor: but now that distinction is disregarded: and therefore if a man, either by deed or will, limit furniture, &c. to A. for life, with remainder over to B. this is good. But where an estate tail in things
personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail; and therefore the law vests in him at once the entire dominion of the property, being analogous to the fee-simple, which a tenant in tail may acquire in a real estate. See 2 Comm. c. 25. II. 3.

EXECUTRY. The personal estate of the deceased; and falling under the distribution of the executor. Scotch Dict.

EXEMPLIFICATION or LETTERS PATENT, &c. See tit. Evidence.

EXEMPLIFICATIONE, A writ granted for the exemplification of an original record. Reg. Orig. 290.

EXEMPTION, exemptio. A privilege to be free from service or appearance; as knights, clergymen, &c. are exempted from appearing at the county court by statute, and peers from being put upon inquests. 6 Rep. 23. Persons seventy years of age, apothecaries, &c. are also exempted by law from serving on juries; and justices of peace, attorneys, &c. from parish offices. 2 Inst. 247.

There is an exemption from tolls, &c. by the king's letters patent: and a writ of exemption, or of case, to be quit of serving on juries, and all public service. Sher. Epitom. 149. Where an act directs that the tolls of a navigation should be exempt from any taxes, rates, &c. other than such as the land, which should be used for the purpose of the navigation, would have been subject to if the act had not been made; that goes to exempt the tolls qua tolls altogether from being rated in respect of the land so exempted, leaving the land ratable as before. Rex v. The Leeds and Liverpool Canal Company, 5 East, 325. See further, the proper titles in this Dict.

EXENNIUM or EXHENIUM, A gift or present; and more properly a new year's gift.

EXERCITUALE, A heriot; paid only in arms, horses, or military accoutrements. Leg. Edw. Conf. 1.

EXETER. By letters patent under the great seal, the scite of the castle of Exon, (part of the duchy of Cornwall,) to be granted to some person appointed by the justices in quarter sessions for the county of Devon, for the term of 99 years, to the use of the said county, and for other public uses; under the ancient yearly rent of 10l. per annum, payable to the crown. Stat. 9 Ann. c. 19.

EXFREDIARE, from ex and the Sax. Frede, Frith, Peace.] To break the peace, or commit open violence. Leg. Hen. 1. c. 13.

EX GRAVI QUERELA, A writ that lies for him to whom any lands or tenements in fee or devised by will, (within any city, town, or borough, wherein lands are devisable by custom,) and the heir of the deviser enters and detains them from him. Reg. Orig. 244. Old Nat. Br. 87. And if a man devises such lands or tenements unto another, in tail, with remainder over in fee, if the tenant in tail enter, and is seised by force of the entail, and afterwards dieth without issue, he in remainder shall have the writ ex gratia querela to execute that devise. New Nat. Br. 441.

Also where tenant in tail dies without issue of his body, the heir
of the donor, or he who hath the reversion of the land, shall have this writ in the nature of a formedon in the reverter. Ibid. If a devisor's heir be ousted by the devisee, by entry on the lands, he may not after have this writ, but is to have his remedy by the ordinary course of the common law. Co. Litt. 111. If the claimant's title accrues within twenty years, the most eligible method of proceeding is now by ejectment.

EXHIBET, exhibition.] Where a deed or other writing is in a suit in chancery exhibited to be proved by witnesses, and the examiner or commissioners appointed certify on the back of it, that the deed or writing was shown to the witness, to prove it at the time of his examination, and by him sworn to; this is then called an exhibit in law proceedings. The same under a commission of bankrupt.

EXHIBITIO, An allowance for meat and drink, such as was customary among the religious appropriators of churches, who usually made it to the depending vicar: the benefaction settled for the maintaining of scholars in the universities, not depending on the foundation, are called exhibitions. Paroch. Antiq. 304.

EXHIBITION, In the Scotch law, is the term applied to an action for compelling the production of writings.

EXIGENDARIES. See Exigenter.

EXIGENT, or exigi facias.] A writ that lies where the defendant in an action personal cannot be found, nor any thing of his within the county, whereby to be attached or distracted: and is directed to the sheriff, to proclaim and call him five county court days, one after another, charging him to appear upon pain of outlawry: it is called exigent because it exacteth the party, i. e. requires his appearance or forthcoming to answer the law; and if he come not at the last day's proclamation, he is said to be quinquies exactus, (five times exacted,) and is outlawed. Cromp. Juris. 188.

The statutes requiring proclamations on exigents awarded in civil actions, are 6 Hen. VIII. c. 4. 31 Eliz. cap. 3. Exigents are to be awarded against receivers of the king's money, who detain the same; and against conspirators, rioters, &c. Stat. 18 Eliz. III. c. 1. And a writ of proclamation shall be issued to the sheriff to make three proclaimations in the county where the defendant dwells, for him to yield himself. &c. Stat. 31 Eliz. c. 3.

The writ of exigent also lies in an indictment of felony, where the party indicted cannot be found: and upon seizing an exigent for a criminal matter before conviction, there shall be a writ of proclamation, &c. 3 Inst. 31. 4 & 5 W. & M. c 22. If a person indicted of felony absent himself so long that the writ of exigent is awarded, his withdrawing will be deemed a flight in law, whereby he will be liable to forfeit his goods; and though he renders himself upon the exigent, after such withdrawing, and is found not guilty, it is said the forfeiture shall stand. 5 Rep. 110. 3 Inst. 232. After a capias directed to the sheriff, to take and imprison a person, &c. if he cannot be taken, an exigent is awarded: and after a judgment in a civil action, the exigent is to go forth after the first capias; but before judgment there must be a capias, alia, and litigatures. 4 Inst. 177. If the defendant be in prison, or beyond sea, &c. he or his executors may reverse the award of the exigent. See further, this Dict. tit. Outlawry.
EXIGENTER, exigendarius. An officer of the court of common pleas; of which officers there are four in number: they make all exigents and proclamations, in actions where process of outlawry doth lie; and also writs of supersedeas, as well as the prothonotaries, upon such exigents made out in their offices. But the issuing writs of supersedeas is taken from them by an officer in the same court, constituted by letters patent by King James the First.

EXIGI FACIAS, See Exigent.

EXILE. A banishment or driving one away from his country. And this exile is either by restraint, when the government forbids a man, and makes it penal to return; or it is voluntary, where he leaves his country upon disgust, but may come back at pleasure. 2 Lev. 191.

One natural and regular consequence of personal liberty under the laws of England is, that every Englishmen may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by sentence of the law. Exile and transportation are both punishments unknown to the common law; and wherever the latter is inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or by the express direction of some statute. See Magna Charta, c. 29, which expressly declares that no freeman shall be banished unless by the judgment of his peers, or by the laws of the land. And for the provisions of the habeas corpus act, st. 31 Car. II. c. 2. (termed by Blackstone a second Magna Charta, and stable bulwark of our liberties) with respect to sending Englishmen prisoners to Scotland, Ireland, or beyond the seas, see tit. False Imprisonment, Habeas Corpus.

Soldiers and sailors form necessary exceptions to these rules; but it is said the king cannot even constitute a man deputy, or lord lieutenant of Ireland, nor make one a foreign ambassador against his will: since these in reality might be no more than honourable exiles. 2 Inst. 46.

See further on this subject, this Diet. tit. Abjuration, Clergy, Felony, Transportation.

EXILITUM, Signifies in law construction, a spoiling: and by the stat. of Marlbridge it seems to extend to the injury done to tenants, by altering their tenure, ejecting them, &c. and this is the sense that Fleta determines, who distinguishes between vestum, destructio, and exilium; for he tells us that vestum and destructio are almost the same, and are properly applied to houses, gardens, or woods; but exilium is when servants are enfranchised, and afterwards unlawfully turned out of their tenements. Fleta, lib. 1, cap. 11. See stat. Marl. c. 25.

EXITUS, Issue or offspring; and applied to the issues or yearly rents and profits of lands. Stat. West. 2. c. 45. See tit. Issues.

EXLEGALITUS, He who is prosecuted as an outlaw. Leg. Edw. Confes. c. 38.

EX MERO MOTU, Words used in the king's charters and letters patent, to signify that he grants them of his own will and mere motion, without petition or suggestion of any other; and the intent and effect of these words is to bar all exceptions that might be taken to the charters or letters patent, by alleging that the king in granting them was abused by false suggestions. Kitch,
When the words *ex mero motu* are made use of in any charter, they shall be taken most strongly against the king. 1 Co. Rep. 451.

**EX OFFICIO.** The power a person has *by virtue of an office*, to do certain acts, without being applied to: as a justice of peace may not only grant surety of the peace, at the complaint or request of any person, but he may demand and take it *ex officio*, at discretion, &c. *Dall.* 270.

**EX OFFICIO INFORMATIONS.** Informations at the suit of the king, filed by the attorney-general, as *by virtue of his office*; without applying to the court wherein filed, for leave, or giving the defendant any opportunity of showing cause why it should not be filed. See tit. *Information.*

**EXONERATIONE SECTÆ.** A writ for the king's ward, to be free from all suit to the county court, hundred court, leet, &c. during wardship. *Fitz.* N. B. 158.

**EXONERATIONE SECTÆ AD CURIAM BARON'T.** A writ of the same nature, sued by the guardian of the king's ward, and directed to the sheriff or stewards of the court, that they do not distress him, &c. for not doing suit of court. *New Nat.* Br. 352. And if the sheriff distress tenants in ancient demesne to come to the sheriff's torn or leet, they may have a writ commanding the sheriff to surcease, &c. *Ibid.* 355. Likewise if a man have lands in divers places in the county, and he is constrained to come to the leet where he is not dwelling, when he resides within the precincts of any other leet, &c. then he shall have this writ to the sheriff to discharge him from coming to any other court-leet than in the hundred where he dwellth. *Ibid.* 357.

By the common law, parsons shall not be distrained to come to court-leet, for the lands belonging to their churches; and if they be, they may have the writ *exonerat. sect. &c.* *Fitz.* N. B. 384. So shall a woman holding land in dower, if she is distrained to do suit of court for such land; when the heir has lands sufficient in the same county. *Ibid.*

**EX PARTE.** Of the one part; as a commission in chancery *ex parte*, is that which is taken out and executed by one side, or party only, on the other party's neglecting or refusing to join: when both plaintiff and defendant proceed, it is a joint commission.

**EX PARTE TALIS.** Is a writ that lies for a *bailiff* or *receiver*, who having auditors assigned to take his account, cannot obtain of them reasonable allowance, but is cast into prison. And the course in this case is, to sue this writ out of the chancery, directed to the sheriff to take four mainporners to bring his body before the barons of the *exchequer* at a certain day, and to warn the lord to appear at the same time. *Fitz.* N. B. 129.

**EXPECTANT.** Having relation to or depending upon; and this word is used in the law with *see* as *see-expectant.*

**EXPECTANCY.** Estates in *see* of two sorts; one created by act of the parties, called a *remainder*; the other by act of law, called a *reversion.* See tit. *Estate, Remainder, Reversion, Executor Devis.*

**EXPEDITATE, expediare.** In the laws of the forest, signifies to cut out the ball of the dog's fore-feet, for the preservation of
the king's game: but the ball of the foot of a mastiff is not to be taken out, but the three claws of the fore-foot on the right side are to be cut off by the skin.  

_Cromp. Jurisd. 152. Manwood, cap. 16._ This relates to every man's dog who lives near the forest; and was formerly done once in every three years: and if any person keeps a great dog not expeditated, he forfeits to the king 38. 46. 4 Inst. 308. See tit. Forest.

**EXPEDITATÆ ARBORES.** Trees rooted up or cut down to the roots. _Fleta, lib. 2. c. 41._

**EXPENDITORS.** Persons appointed by commissioners of sewers to pay, disburse, or expend the money collected by the tax for the repairs of sewers, &c. when paid into their hands by the collectors, on the reparations, amendments, and reformation ordered by the commissioners, for which they are to render accounts when required. _Laws of Sewers, 87, 88._ See tit. Sewers. The steward who supervises the repair of the banks and watercourses in _Romney Marsh_, is called the _Expenditor._

**EXPENSÆ LITIS.** Costs of suit, allowed a plaintiff or defendant, recovering in his action. See tit. Costs.

**EXPENSIS MILITUM NON LEVANDIS, &c._ An ancient writ to prohibit the sheriff from levying any allowance for knights of the shire, upon those that hold lands in ancient demesne. _Reg. Orig. 251._ For there was also a writ _de expensis militum levandis_, for levying expenses for knights of the parliament, &c. _Reg. Orig. 191._ See tit. Parliament.

**EXPLEES.** The rents or profits of an estate, &c. See _Explees._

**EXPLORATOR.** A scout; also a huntsman, or chaser.

**EXPORTATION.** The shipping or carrying out the native commodities of England for other countries; mentioned in the statutes relating to the Customs. See this _Dict. tit. Navigation Acts._

**EXPOSITION or DEEDS.** Shall be favourable, according to the apparent intent: and be reasonable and equal, &c. _Co. Litt. 313._ See tit. Deed.

**EX POST FACTO.** Is a term used in the law, signifying something done after another thing that was committed before. And an act done, or estate granted, may be made good by matter ex _post facto_, that was not so at first, by ejection, &c. As sometimes a thing well done at first, may afterwards become ill. 5 _Rep. 22._ 8 _Rep. 146._ See tit. Statute.

To EXTEND, _extendere._] To value the lands or tenements of one bound by a statute, who hath forfeited his bond, at such an indifferent rate, as by the yearly rent the creditor may in time be paid his debt. _Fitz. N.B._ See the next article.

**EXTENDI FACIAS, or EXTENT, _extentes._** A writ of execution, or commission to the sheriff for the valuing of lands or tenements; and sometimes the act of the sheriff or other commissioner upon this writ. _Bro. 313._ See this _Dict. tit. Execution._ This term is also used for the estimate or valuation of lands, which, when made to the utmost value, is said to be the full extent: whence come our extended rents, or rack-rents.

If one bound to the king by specialty, or to others by statute, recognizance, &c. hath forfeited it: so that by the yearly rent of the debtor's lands, the creditor is to be paid his debt; upon this
the creditor may sue a writ to the sheriff out of the chancery to deliver him the lands and goods to the value of the debt, which is termed a liberate. Fitz. N. B. 131. This is after the extent directed to the sheriff to seize and value the lands, &c. of the debtor, to the utmost extent. 4 Rep. 67.

Lands and goods are to be appraised and extended by the inquest of twelve men, and then delivered to the creditor, in order to the satisfaction of his debt: every extent ought to be by inquisition and verdict, by the stat. Westm. 2. And the sheriff cannot execute the writ without an inquisition. Cro. Jac. 569.

The body of the cognisor, and all lands and tenements that were his at the time of the statute, &c. entered into, or afterwards, into whose handssoever they come, are liable to the extent. 2 Inst. 396. But copyhold lands are chargeable only during the life of the cognisor; and may not be extended by elegit, so as to admit a stranger to have interest in the lands held by copy, without the admittance of the lord. Lands in ancient demesne, annuities, rents, &c. are extensible. 1 Roll. Abr. 88. Two parts of an entire rent may be delivered upon an extent by the sheriff. Cro. Eliz. 742. But if the cognisor of a statute have a rent-charge, and before the extent he purchase parcel of the land; the rent is gone, and shall not be in execution: 'tis otherwise if he purchases after extent of the rent. Dyer, 296. A reversion of lands, &c. may not be extended; but a plaintiff had judgment for his debt and damages de reversione cum accidenti, and a special elegit to extend the moiety, &c. 2 Sid. 86. Dyer, 373.

An advowson in gross is not extensible on elegit, &c. Stat. Westm. 2. cap. 18. An office of trust cannot be extended, because 'tis not assignable; and nothing shall be extended, but what may be assigned over. Dyer, 7. Though an office is extensible in equity. Chanc. Rep. 39. Goods and chattels, as leases for years, cattle, &c. in the cognisor's own hands, and not sold for valuable consideration, are subject to the extent. As the lands are to be delivered to the party at a reasonable yearly value, so the goods shall be delivered in extent at a price that is reasonable; and on a scire facias ad computandum, the cognisee is to account according to the extended value; not the real value of the land. Hardr. 136.

If the extenders appraise and value the lands too high, the cognisee at the return of the writ may pray that they may take and retain the lands at the rate appraised; and then 'tis said he may have execution against their lands for the debt; but this may not be on elegit. Cro. Jac. 12. It has been adjudged, that at the return of the writ the cognisee may refuse the lands, &c. extended, if over valued. Cro. Car. 148.

Where lands are extended at under value, and delivered in execution, the cognisee hath an interest in the land, which cannot be devested by finding of surplusage. Cro. Eliz. 206. Cro. Jac. 82.

The cognisor cannot enter upon the cognisee, when satisfaction is received for the debt, but is put to his scire facias on an extent: though on an elegit, the defendant may enter because the land is only awarded, till the debt which is certain, is satisfied; whereas on extent, the land is to be held until the debt, damages, and costs, &c. are satisfied: and the cognisee being in by matter of record, shall not be put out but by matter of record, viz. a scire facias.

After an extent returned, a liberate shall go to the sheriff, reciting the extendi facias and return, and commanding that he deliver the goods and lands to the cognisee (under a statute-staple, &c.) et per extentum et pretium illa habere voluit. Fitz. N. B. 131. Lutw. 432.

The cognisee hath no absolute property in land, by the extent, till the delivery upon the liberate: but notwithstanding, by the very extent they are in custodia legis for his benefit. Cro. Car. 106. 148. No actual seisin can be on an extent, and a cognisee of a statute staple, &c. cannot bring ejectment before the liberate; nor can the sheriff upon the liberate turn the tenant out of possession, as he may upon a hab. fac. possessionem. 1 Vent. 41. Where there is an extent upon a statute, and a liberate thereupon, but not returned, yet it is good; though regularly, whenquisitions are taken, the writ ought to be returned. 4 Rep. 67. 1 Litt. Abr. 592. The sheriff may be charged to make a return of his writ, if he put the cognisee in possession of part only; and so the cognisee may have possession of the whole. 2 Nels. Abr. 774. But it is said if a person suing out an extent, die before the return of a writ, the sheriff may not proceed in his inquisition, &c. afterwards; for there must be a prosecution de novo.

After a full and perfect execution had by extent, returned, and of record, there shall never be any re-extent upon an eviction: but by stat. 32 Hen. VIII. cap. 5, if lands delivered in execution on a judgment, statute or recognisance shall be evicted, without fraud, or default of the tenant, who holds them in execution, before the debt and damages are wholly levied, the recoveror or cognisee may have a scire facias against the person on whom the execution was first sued, his heirs, executors or assigns, of lands then liable, returnable in the same court, forty days after the teste; and if the defendant makes default, or shows not cause, the chancellor or justices of the court where the scire facias is returned shall make a new writ of the like nature of the former execution for levying the residue of the debt. Co. Litt. 290.

If lands be extended upon a mistake, &c. a re-extent may be had; see Dyer, 399. If part of the lands is evicted, the cognisee is to hold over the residue of the land till the debt is satisfied. 4 Rep. 66. When lands are delivered in extent, it is as if the cognisee had taken a lease thereof for years, until the debt is satisfied; and he shall never afterwards take out a new execution; the cognisee having accepted the land upon the liberate, the law presumes the debt to be satisfied. 1 Lutw. 429. An extent was filed, and though it was discovered that lands were omitted, the court would not grant a re-extent. Sid. 355. By stat. 16 & 17 Car. II. c. 5. (made perpetual by stat. 22 & 23 Car. II. c. 2.) when any judgment, statute or recognisance shall be extended, (within twenty years after such judgment, &c. had,) the same shall not be avoided or delayed by occasion that any part of the lands extendible are omitted out of such extent: saving to the parties whose lands shall be extended, their remedy for contribution against those whose lands are omitted; except heirs within age.
Where a fieri facias issues, and is delivered to the sheriff to be executed, the property of the goods is vested by the delivery, and an extent afterwards for the king comes too late. *Comb.* 123. See also, 2 *Black. Ref.* 1294. *Doug.* 415. 399. 4 *Term Rep.* K. B. 402. See this *Dict. tit. Execution, Receiver.*

**EXTINGUISHMENT,** from Lat. extingo.] The extinction or annihilation of a right, estate, &c. by means of its being merged in, or consolidated with another, generally a greater or more extensive right or estate. Wherever a right, title, or interest is destroyed, or taken away by the act of God, operation of law, or act of the party, this in many books is called an extinguishment. *Co. Litt.* 147. b. 1 *Roll. Abr.* 293.

This extinguishment is of various natures, as applied to various rights, viz. Estates, Commons, Copyholds, Debts, Liberties, Services, and Ways; see more at large under those titles: what follows will give some general information on the subject.

**EXTINGUISHMENT OF ESTATES.** If a man hath a yearly rent out of lands, and afterwards purchases the lands whereout it ariseth, so that he hath as good an estate in the land as in the rent: now both the property and rent are consolidated or united in one possessor; and therefore the rent is said to be extinguished. Also where a person has a lease for years, and afterwards buys the property; this is a consolidation of the property and fruits, and is an extinguishment of the lease: but if a man have an estate in the land but for life or years, and hath a higher estate, as a fee-simple in the rent; the rent is not extinguished, but in suspense for a time; for after the term, the rent shall revive. *Terms de Ley.*

Extinguishment of a rent is a destroying of the rent by purchase of the land; for no one can have a rent going out of his own land: though a person must have as high an estate in the land, as in the rent, or the rent will not be extinct. *Co. Litt.* 147. If a person hath a rent-charge to him and his heirs issuing out of lands, and he purchaseth any part of the land to him and his heirs; as the rent is entire and issuing out of every part of the land, the whole rent-charge is extinguished: though it is not so where one hath a rent-service, and purchaseth part of the land out of which it issues; rent-service being apportionable according to the value of the land, so that it shall only extinguish the rent for the land purchased. *Litt.* 222. *Co. Litt.* 148. And if the grantee of a rent-charge purchases parcel of the lands, and the grantor by his deed granteth that he may distrain for the rent in the residue of the land, this amounts to a new grant. *Co. Litt.* 147. See *tit. Grant, Estate.*

If a man be seised of a rent-charge in fee, and grants it to another and his heirs, and the tenant attorns; the grantor is without remedy for the rent in arrear before his grant; and such arrears become as if they were extinct. *Vough.* 40. 1 *Litt. Abr.* 594. A. B. made a lease for years of land to another, and afterwards granted a rent-charge to C. D. who devised the said rent to the said A. B. till 100l. should be levied; then to B. G. and died: Adjudged that by the devise to A. B. the rent was suspended, and that a personal thing once suspended by the act of the party, is extinguished for ever. *Dyer,* 140.

If tenant for life makes a lease for years, rendering rent, and afterwards the reversion descends to the tenant for life; this is...
not an extinguishment of the term; but it is otherwise if he have the reversion by purchase. 1 Co. Rep. 96. A joint-tenant for life purchases the land in reversion, it will extinguish the estate for life for a moiety, and sever the joint-tenure. 2 Rep. 60. Lands are given to two men, and the heirs of their bodies; though they have an estate for life jointly, and several inheritances, yet the estate for life is not extinct: Contra, if it be by several conveyances; as where a lease is made to two for their lives, and after the lessor grants the reversion to them and their heirs, &c. here the life estate will be extinguished. Co. Litt. 128.

If one after his title begun to be tenant by the curtesy, make a feoffment in fee upon condition, and enter for the condition broken, the estate is extinct, so that if his wife die, he shall be tenant by the curtesy. 1 Rep. 18. Where a man hath an estate for his own life, and for another’s life at once; the estate pur aeter vie will be extinguished in the estate for his own life, which is greater in law than the other. 11 Rep. 87. Dyer, 11. See Bro. 409. Moor, 94. 2 Nels. Abr. 821.

When the frehold cometh to the term, the estate for years is extinct. 2 Nels. Abr. 820. Where the remainder of a term is granted over to another, if the party in possession purchase the fee-simple, though by this means his interest is extinguished; yet that shall not defeat the reversionary interest. 10 Rep. 52. 2 Nels. 830.

A fine, &c. of lands, will extinguish a term; and by purchase of an estate in fee-simple, an estate-tail in land is extinct. 9 Rep. 139. But if a fee-simple and fee-tail meet together by descent, the estate-tail will not be extinguished. 3 Rep. 61. Descent of lands to the same person who has a term, will extinguish the term. Moor, 236.

When a lessor enters tortiously upon the lessee against his consent, the rent is extinguished. 2 Lev. 143. But it has been adjudged, that rent is not extinct by the entry of the lessor, but only suspended; and revives by the lessee’s re-entry. Dyer, 361. An infant has a rent, and purchases the land out of which it is issuing; by this the rent will be suspended, but not extinct. Bro. Extinguishment. A man lessee for years takes a wife, or woman lessee a husband, that hath the reversion after the lease; here the term is not extinguished. 12 Rep. 81. See tit. Baron and Feme.

Extinguishment of Common. By purchasing lands wherein a person hath common appendant, the common is extinguished. Cro. Eliz. 394. A commoner releases his common in one acre, it is an extinguishment of the whole common. Show. Rep. 350. And where a person hath common of vicinage if he encloses any part of the land, all the common is extinct. 1 Browne, 174.

But if one hath common appendant in a great waste, belonging to his tenant, and the lord improve part of the waste leaving sufficient; if he after make a feoffment to the commoner of the land improved, this will be no extinguishment. Dyer, 339. Hob. 172. A commoner aliens part of his land, to which the common doth belong; the common is not extinct, but shall be divided. 2 Shef. Abr. 152. See tit. Common.

Extinguishment of Copyhold. It is laid down as a general rule, that any act of the copyholder’s, which denotes his intention to hold no longer of his lord, and amounts to a determination of
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his will, is an extinguishment of his copyhold. Hutt. 81. Cro. Eliz. 21. 1 Jones, 41.

As if a copyholder in fee accepts a lease for years of the same land from the lord, this determines his copyhold estate; or if the lord leases the copyhold to another, and the copyholder accepts an assignment from the lessee, his copyhold is extinct. Moor, 184. 2 Co. 16. b. Godb. 11. 101.

So if a copyholder bargains and sells his copyhold to the lessee for years of the manor, his copyhold is thereby extinguished; or if he joins with his lord in a feoffment of the manor, his copyhold is thereby extinct, for these are acts which denote his intention to hold no longer by copy. Hutt. 55. 1 Jones, 41. S. C. Godb. 11.

So if a copyholder accepts to hold of his lord, by bill under the lord's hand, this determines his copyhold; so if he accepts an estate for life by parol, if with livery, this is an extinguishment; otherwise not; for without livery, nothing but an estate at will passes, which cannot merge or extinguish an estate at will. 1 And. 199. Latch. 213.

If one seised of a manor in right of his wife lets lands by in durance for years, this doth not destroy the custom as to the wife, for after the death of her husband she may demise it again by copy. Cro. Eliz. 459.

So if a copyholder is in the hands of a subject, who after becomes king, the copyhold is extinct, for it is below the majesty of a king to perform such servile services; yet after his death, the next that hath right shall be admitted, and the tenure revived. 2 Sid. 82. 4 Co. 24. Cro. Eliz. 252. See 2 Lr. 208. 4 Co. 26. b. Cro. Eliz. 103. And a copyhold estate is extinct whenever it becomes not demisable by copy. Coke's Copyholder, 62. See further, tit. Copyhold.

EXTINGUISHMENT OF DEBT. If feme sole debtee take the debtor to husband; or there be two joint obligors in a bond, and the obligee marries one of them; or in case a person is bound to a feme sole and another, and she takes the obligor to husband; in these cases, the debt will be extinguished. 8 Rep. 136. And if a debtor makes the debtee his executor, or him and another executors, and they take the executorship upon them; or if the debtee makes his debtor executor, &c. it is an extinguishment of the debt, and it shall never revive. Plov. 184. 1 Satk. 304. But where a debtee or debtor executor legally refusest; or he and others being made executors they all refuse, then the debt is revived again. Plov. 185. See tit. Baron and Feme, Executor.

It is agreed as a general rule, that a creditor's accepting a higher security than he had before, is an extinguishment of the first debt; as if a creditor by simple contract accepts an obligation, this extinguishes the simple contract debt. 1 Roll. Abr. 470, 471. 604. 6 Co. 44.

So if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court; for by the deed the legacy is extinct, and it is become a mere debt at common law. Yelv. 38.

So if a bond creditor obtains judgment on the bond, or has judgment acknowledged to him, he cannot afterwards bring an
action on the bond; for the debt is drowned in the judgment, which is a security of a higher nature than the bond. 6 Co. 44. b.

But these cases must be understood where the debtor himself enters into these securities; and therefore if a stranger give bond for a simple contract due by another, this does not extinguish the simple contract debt; but if upon making the contract, a stranger gives bond for it, or being present, promises to give bond for it, and after does so, the debt by simple contract is extinguished, the obligation being made upon, or pursuant to the contract. 2 Leon. 110.

But the accepting a security of an inferior nature is by no means an extinguishment of the first debt; as if a bond be given in satisfaction of a judgment. Cro. Jac. 579. 2 Brownl. 29. Cro. Jac. 649, 650.

Also the accepting a security of equal degree is no extinguishment of the first debt; as where an obligee has a second bond given to him; for one deed cannot determine the duty upon another. Cro. Eliz. 304. 716. 727. 1 Brownl. 74. Litt. Rep. 58. Cro. Car. 86.

Though a bond is taken for a simple contract debt, yet if it is after an act of bankruptcy, the simple contract is not extinguished. Stra. 1042.

By a release of part of a debt due on bond, the whole is gone, and the obligation extinguished. Bro. Contract, 90. 1 And. 235. See further, tit. Acceptance, Bond.

Extinguishment of liberties. Liberties and franchises granted by the king, may sometimes be extinguished, and sometimes not. Moor, 474. When the king grants any privileges, liberties or franchises, which were in his own hands, as parcel of the flowers of the crown, such as bona felonum fugitivorum et utilagorum waifs, strays, deodand, wreck on the sea, &c. if they come to the crown again, they are drowned and extinct in the crown, and the king is seised of them jure corona: but if liberties of fairs, markets or other franchises, and jurisdictions, be erected and created by the king, they will not be extinguished, nor their appendances severed from the possessions. 9 Rep. 25. A man has liberties by prescription, if he takes letters patent of them, the prescription will be gone and extinct; for things of a higher determine those of a lower nature. 2 Hen. VII. 5. See tit. King.

Extinguishment of services. The lord purchases or accepts parcel of the tenancy, out of which an entire service is to be paid or done; by this the whole service will be extinct; but if the service be pro bono publico, then no part of it shall be extinguished; and homage and fealty are not subject to extinguishment, by the lord's purchasing part of the land. 6 Rep. 1. 105. Co. Litt. 149. If the lord and another person do purchase the lands, whereout he is to have services, they are extinct: also by severance of the services, a manor may be extinguished. Co. Litt. 147. 1 And. 237. See tit. Tenure.

Extinguishment of ways. If a man hath a highway as appendant, and after purchases the land wherein this way is, the way is extinct. Terms de Ley. Though a way of necessity to market
or church, or to arable land, &c. is not extinguished by purchase of ground, or unity of possession. 11 Hen. VII. 25. Co. Litt. 155. See tit. Way.

EXTIRPATIONE. A judicial writ, either before or after judgment, that lies against a person who, when a verdict is found against him for land, &c. doth maliciously overthrow any house, or extirpate any trees upon it. Reg. Jud. 13. 55.

EXTOCARE, To grub up lands, and reduce them to arable or meadow. Mon. Ang. tom. 2. p. 71.

EXTORTION, extortio, from extorquere, to wrest away.] In a large sense, any oppression under colour of right: it is usually applied to that abuse of public justice which consists in the unlawful taking by any officer, &c. by colour of his office, of any money, or valuable thing, from a person where none at all is due, or not so much is due, or before it is due. Co. Litt. 368. 10 Rep. 102. See tit. Bribery, Fees.

The distinction between bribery and extortion seems to be this. The former offence consists in the offering a present, or receiving one, if offered; the latter, in demanding a fee or present, by colour of office.

At the common law, which was affirmed by the statute of Westm. 1. c. 26. it was extortion for any minister of the king, whose office did any way concern the administration and execution of justice, or the common good of the subject, to take any reward for doing his office, except what he received from the king; though reasonable fees for the labour and attendance of officers of the courts of justice are not restrained by statute, which are stated and settled by the respective courts; and it has been thought expedient to allow these officers to take certain immediate fees in many cases. 2 Inst. 209. 3 Inst. 149. 1 Hawk. P. C. c. 68.

The taking of money by virtue of an office, implies the act to be lawful; but to take any money by colour of an office, implies an ill action: and the taking being for expedition of business, is judged by colour of the office, and unlawful. 2 Inst. 206. Co. Litt. 368.

Yet according to some it seems that an officer, who takes a reward which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a premium it would be impossible in many cases to have the laws executed with vigour and success. 2 Inst. 210. 3 Inst. 149. Co. Litt. 368.

But it has been always held, that a promise to pay an officer money for the doing of a thing which the law will not suffer him to take anything for, is merely void, however freely and voluntarily it may appear to have been made. 1 Roll. Abr. 16. 1 Roll. Ref. 313. Nay, 76. 1 Jones, 65. Cro. Ediz. 654. Moor, 468. Cro. Jac. 103.

It is an extortion to oblige an executor to prove a will in the bishop’s court; and to take fees thereon, knowing the same to have been proved in the prerogative court. Str. 73. Or in a sheriff’s officer to admit a prisoner to bail, upon an agreement to receive a certain sum when the prisoner should pay to a third person another sum of money. 2 Burr. 924. To arrest a man in order to obtain
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a release from him. 8 Mod. 189. In a gaoler to obtain money
from his prisoner by any colourable means. 8 Mod. 226. Stra.
575. Or in a churchwarden colore officii. 1 Sid. 307. In a miller,
if he takes more toll than is due by custom. Lord Raym. 159.
Or a commissary for absolution. 3 Leon. 258. Or a ferryman
more for his ferry. 4 Mod. 101. Or to seize upon the place where
a fair is held, and by building stalls to force an exorbitant price
for them. Lord Raym. 150. Or in an under-sheriff to refuse to
execute process till his fees are paid. Salk. 330. Or to take a
bond for his fee before execution is sued out. Hutt. 53. Or for a
coroner to refuse his view until his fees be paid. 3 Inst. 149.

Extortion, by the common law, is severely punished, on indict-
ment, by fine and imprisonment, and removal of officers from the
offices wherein committed. 1 Hawk. P. C. c. 68. By the stat. 3
Edw. I. inferior officers of justice, &c. guilty of extortion, are to
render, by c. 26. double, and by c. 30. treble value ; and there are
divers other statutes for punishing extortions of sheriffs, bailiffs,
gaoler, clerks of the assize, and of the peace, attorneys and solici-
tors, &c. See stats. 23 Hen. VI. c. 7. 9. 33 Hen. VIII. c. 24.
29 Eliz. c. 4. 1 Jac. I. c. 10. 9 & 10 Wm. III. c. 41. 10 & 11
Wm. III. c. 23. 3 Geo. I. c. 15. 32 Geo. II. c. 28. § 11. 17 Geo.

In cases of extortion, there must be a positive charge, and that
the person charged with it took so much extorsivum or colore officii,
which words are as essential as proditorii or felonice for treason or
felony. 2 Salk. 680.

Officers may be jointly indicted of extortion, as they may be
jointly guilty of the offence. 1 Salk. 382.

The place where the extortion was committed should be set
down in the declaration. See Pl. C. c. 200. The sum certainly
extorted must be particularly set forth, and he cannot say that the
defendant did extort divers sums from divers men generally. Godb.
438. pl. 583. Mich. 4 Car.

The indictment (which may be brought at the sessions, Str.73.)
or information must state the fact particularly. 3 Leon. 268. 25
Edw. III. st. 3. c. 9. 11 Mod. 89. It must also specify the time
when the offence was committed. 4 Mod. 101. 103. But although
it be omitted to be stated for what the thing extorted was taken,
it is good after verdict. Sid. 91. And in general the court of K.
B. will oblige the party to demur to a defective indictment for ex-
tortion. 5 Mod. 13. And whatever may be the sum, if there is
proof only of a shilling taken, the defendant is guilty: for the ta-
kings is the offence, and not the contract. Lord Raym. 149. And
he also who assists is equally guilty, for there are no accessories in
extortion. Str. 73.

Against attorneys for extortion, action may be brought, and the
party grieved shall have treble damages and costs; but information
will not lie on the stat. 3 Jac. I. cap. 7. Sid. 434. 2 Nels.
822.

If by abuse of the process of one of the courts at Westminster,
a sheriff's officer extort a promissory note from a suitor, and de-
clare upon it in another of the courts at Westminster, the latter
court cannot interfere summarily to punish the officer. 2 Doe. &
Pull. 88.
EXTRACTA CURLE. The issues or profits of holding a court arising from the customary fees, &c. Paroch. Antiq. 572.

Extracts of writings or records, being notes thereof. See tit. Extracts.

In the Scotch law the extract is the certified copy by a clerk of the court, of the proceedings in an action carried on before that court, and of the judgment pronounced; and it contains an order for execution or proceedings thereupon.

EXTRAJUDICIAL. Is when judgment is had in a cause not depending in that court where given, or wherein the judge has not jurisdiction.

EXTRAPAROCHIAL. Out of any parish; anything privileged and exempt from the duties of a parish. See this Dict. tit. Poor.

EXTRAVAGANTS. Certain constitutions of the Popes so called, because extra corpus canonicum Gratiani, sive extra decretorum libros vagantur. Du Cange.


EXUPERARE. To overcome; sometimes it signifies to apprehend or take, as, exuperare vivum vel mortuum. Leg. Edm. c. 2.

EY, insula, an island. Where the names of places end in ey, it denotes them an island. As Ramsey, is the island of Rams; Sheffiey, the island of Sheep; Hersey, the island of Harts, &c.

EYERY Of hawks, See tit. Aerie.

EYRE. Vide Eire, and Justices in Eyre.

END OF THE SECOND VOLUME